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No. 5979

1658 United States 1652

Circuit Court of Appeals

For the Ninth Circuit.

HEALY TIBBITTS CONSTRUCTION COMPANY, a Corporation,

Appellant,

vs.

SHELL OIL COMPANY, a Corporation, and SHELL UNION OIL CORPORATION, a Corporation,

Appellees.

Apostles on Appeal.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

FILED
NOV 8 - 1929
F P. O'BRIEN,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED APOSTLES ON APPEAL.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

NAMES OF PROCTORS.

Proctors for Petitioners and Appellees:

FARNHAM P. GRIFFITHS, Esq.

McCUTCHEN, OLNEY, MANNON & GREENE.

Proctors for Appellant:

WILLIAM DENMAN, Esq.

EDWIN T. COOPER, Esq.

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the Above-entitled Court:

The Healty Tibbitts Construction Company, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from that certain order and interlocutory decree denying said Healy Tibbitts Construction Company's motion and petition for Interlocutory Decree and Order annulling or modifying the restraining order made by said District Court enjoining the filing of suits by said Healy Tibbitts Construction Company against the barge "Martinez" and the petitioners for limitation arising from injuries sustained by Healy Tibbitts Construction Company by reason of the collision of said barge "Martinez" with Pier 45 in San Francisco Bay, entered herein on the 19th day of October, 1929, hereby requests you to prepare and certify apostles on appeal to be filed in said Appellate

Court in due course and to include in said apostles the following papers, documents and matters:

(1) Those matters specified in subdivision a and b of Paragraph 1 of Rule 4 of the Rules in Admiralty for the United States Circuit Court of Appeals for the Ninth Circuit. [1*]

(2) The petition for limitation of liability and all amendments thereto.

(3) Order for issuance of monition and restraining order.

(4) Monition and all proceedings taken, made and returned by the United States Marshal to this court.

(5) Findings and report of Commissioner on value of tug "Falcon."

(6) Healy Tibbitts Construction Company's motion and petition for interlocutory decree and order annulling or modifying restraining order, and all amendments thereto.

(7) Decree for default of all persons except Healy Tibbitts Construction Company.

(8) Stipulation and Court order allowing commencing of State Court suits by Healy Tibbitts Construction Company for faults of the barge "Martinez."

(9) Order and interlocutory decree denying said Healy Tibbitts Construction Company's petition and motion.

(10) Notice of appeal.

(11) Assignments of error.

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*Page-number appearing at the foot of page of original certified Apostles on Appeal.

(12) This praecipe for apostles on appeal.

WILLIAM DENMAN,
EDWIN T. COOPER,
Proctors for Healy Tibbitts Construction Company,
Appearing Specially Herein.

[Endorsed]: Receipt of a copy of the within praecipe for apostles on appeal is hereby admitted this 30th day of October, 1929.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON & GREENE,
Proctors for Petitioners.

Filed Oct. 30, 1929. [2]

PETITION FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

To the Honorable, the Judges of the Southern Division of the United States District Court, for the Northern District of California—In Admiralty:

The petition of Shell Oil Company, a corporation, and Shell Union Oil Corporation, a corporation, for exoneration from or limitation of liability, civil and maritime, alleges as follows:

I.

That petitioner, Shell Oil Company, now is, and was at all times herein mentioned, a corporation organized and existing under and by virtue of the

laws of the State of California, and was at all said times the charterer, under a bare boat charter, and operator of the steam tug "Falcon." The name of Shell Oil Company was at all the times herein mentioned Shell Company of California. The name of said corporation was changed to Shell Oil Company on January 1, 1929. That at all said times [3] the said steam tug "Falcon" was manned, victualed and navigated by and at the expense of said Shell Oil Company. That at all said times said steam tug "Falcon" was fully officered, manned, equipped and supplied, and was in all respects seaworthy.

II.

That Shell Union Oil Corporation now is, and was at all the times herein mentioned, a corporationed organized and existing under and by virtue of the laws of the State of California, and now is, and was on the 23d day of July, 1928, the principal stockholder in said Shell Oil Company.

III.

That said steam tug "Falcon" at all times herein mentioned was, and now is, a vessel of the United States, and was at all said times employed by petitioner, Shell Oil Company, to tow its barges upon the navigable waters of the United States, to wit, the waters of the Bay of San Francisco. That said steam tug "Falcon" is now within the Northern District of California and the jurisdiction of this Honorable Court.

IV.

That in the afternoon of the 23d day of July, 1928, the said steam tug "Falcon" was sent to the Shell Oil Company Station at North Beach, San Francisco, in the basin between Pier 45 and the Golden Gate Ferry slips, for the purpose of towing the said barge "Martinez" from said station at said place to the Shell Oil Company Station at Army Street, San Francisco. That while said steam tug "Falcon" was engaged in towing said barge "Martinez" out of said basin, the said barge "Martinez" was caused to collide with said Pier 45. Upon information and belief that said Pier 45 was damaged by the collision. [4]

V.

That Healy-Tibbitts Construction Company, which company petitioners are informed was engaged in constructing said Pier 45 at the time of said collision, is claiming damages from your petitioners in the amount of $41,578.25. Upon information and belief, Healy-Tibbitts Construction Company is preparing to bring suit against your petitioners for damages in the said amount of $41,578.25 for damage alleged to have been done to said pier by reason of said collision. That the attorney who has presented said claim in behalf of Healy-Tibbitts Construction Company is Edwin T. Cooper and his address is 620 Market Street (Room 801 Crocker Building), San Francisco, California.

VI.

That the circumstances of said collision were as

follows: The tug "Falcon" took the barge "Martinez" in tow at the bulkhead near the said Shell Oil Company station at North Beach. The barge "Martinez" was lying port side to the bulkhead and heading in a westerly direction when the tug "Falcon" made fast its hawser to the towing bridle of the bow of the "Martinez." At said time the tide was flooding and there was a westerly wind blowing.

The tug "Falcon," with the barge "Martinez" in tow, proceeded out toward the mouth of the said basin, and when the "Falcon" had reached the mouth of said basin and was in the vicinity of the upper and outer portion of Golden Gate Ferry slip No. 4, a ferry-boat belonging to and operated by the Golden Gate Ferry Company between San Francisco and Berkeley suddenly emerged from either slip No. 3 or slip No. 4 and cut across the bow of the "Falcon." In order to avoid a collision with the ferry-boat the "Falcon" stopped her engines. As soon as this was done the "Martinez," which had no motor power of its own, ranged ahead [5] because of the momentum it had, causing the towing hawser to slacken. As soon as the "Martinez" was released from the pull of the towing hawser, it commenced to fall off toward Pier 45, due to the influence of the flood tide and westerly wind. When danger of collision with said ferry-boat was avoided, the engines of the "Falcon" were immediately put at full speed ahead and the "Falcon's wheel put hard astarboard in an effort to prevent the "Martinez" from striking Pier 45. In

spite of the "Falcon's" efforts the "Martinez" came in contact with Pier 45, her starboard quarter striking against the pier first.

VII.

That said damage to Pier 45 was not caused by any fault or negligence on the part of petitioners, or either of them. Upon information and belief that said collision was caused by the fault and negligence of the officers, agents and employees of the said Golden Gate Ferry Company, which company was operating the said ferry-boat. That said Golden Gate Ferry Company and its officers, agents and employees were negligent in the following respect, among others which petitioners beg leave to set up when more fully informed:

1. In crossing the bow of the tug "Falcon" under the aforesaid circumstances.

2. In not swinging clear of the mouth of said basin when the officers and crew of said ferry-boat knew or should have known that the tug "Falcon" was coming out of said basin with a tow.

3. In not giving sufficient warning to said tug "Falcon" that the said ferry-boat was about to emerge from her slip.

4. In causing said tug "Falcon" to stop her engines, in order to avoid a collision, with the result that the tow of said tug "Falcon" collided with Pier 45. [6]

5. In failing to navigate with proper care and caution under the circumstances.

VIII.

That said barge "Martinez," which at all said times was owned and operated by petitioner Shell Oil Company, had no motive power of its own, and being in the tow of the said tug "Falcon" was helpless and was entirely free from fault in the premises.

IX.

That said collision and said damage to Pier 45, under construction, and all other losses, destructions, damages or injuries, whether of or to the life of persons or to property or goods or merchandise, done, occasioned or incurred on said voyage, or due to or in anywise arising out of said collision hereinabove described, were done, occasioned and incurred without the consent or privity or knowledge or design or neglect of petitioners, or either of them, or fault or neglect of any of their officers, agents or servants.

X.

That the voyage upon which the aforesaid accident occurred and in connection with which the aforesaid damage was caused and as to which your petitioners seek exoneration from or limitation or liability, was terminated at the time and place of the collision.

That petitioners had no interest in said tug "Falcon" at said time other than the interest arising out of and by virtue of said charter-party. That the value of each of petitioner's interests in said tug "Falcon" at said time did not exceed the sum

of Two Hundred Fifty (250) Dollars. That nevertheless, in case this Court should find that the value of the interest of either petitioner was that of owner, under the circumstances, and the value of such interest equal to the value of the true owner's [7] interest, and in order to fulfill any obligation in that regard, each petitioner offers, under protest and without prejudice to the other allegations herein or the relief prayed for, to give its stipulation or undertaking in an amount equal to the entire value of the tug "Falcon" at the end of said voyage and in an additional amount, to wit, Five Hundred (500) Dollars to cover freight, or its equivalent, if any be found to be due.

XI.

That each of your petitioners desires to contest its liability for the injuries, losses and damages, whether to persons or to property or goods or merchandise, done, caused, occasioned or incurred by reason of the collision of the said barge "Martinez" with said Pier 45, and in the event your petitioners, or either of them, shall be found liable for any such losses, destructions, damages or injuries, or any part thereof, your petitioners do, and each of them does, hereby claim the benefit of the limitation of liability provided for in sections 4283 to 4289, inclusive, of the Revised Statutes of the United States, and also hereby claim the benefit of the limitation of liability, provided for in the Act of Congress of June 26th, 1884, Chapter 121, and particularly the benefits of Section 18 of said Act (23

Stat. at L. 57); and also hereby claim the benefit of the limitation of liability provided for in Section 4289, as amended by the Act of Congress approved June 19, 1886, Chapter 421, and particularly Section 4 of said last-mentioned Act; and also hereby claim the benefit of any and all Acts of the Congress of the United States, if any, amendatory or supplementary to the several sections and acts aforesaid, or any thereof. And each of your petitioners is now ready, able and willing, and hereby offers to give its stipulation or stipulations with sufficient sureties, conditioned for the [8] payment into this court by each of said petitioners of the value of petitioners' respective interests in the said steam tug "Falcon," if required, as of the date of said collision and termination of said voyage, to wit, July 23, 1928, with interest thereon, together with freight pending, if any, for and at the termination of said voyage, such payment to be made whenever the same shall be ordered herein.

XII.

Upon information and belief that there are no liens upon said tug "Falcon" prior or paramount to any liens that may have accrued by reason of the matter aforesaid and that the amount of the claims which have been made against petitioners, as hereinbefore set forth, exceeds the amount and value of the interest of your petitioners, and each of them, in said tug "Falcon," together with her freight pending, if any, at the end of said voyage.

XIII.

That, all and singular, the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, your petitioners pray that this Court order due appraisement to be had of amount or value of the respective interests of your petitioners in the said steam tug "Falcon," her engines, boats, boilers, tackle, apparel, furniture, etc., as the same were at the termination of the voyage upon which the collision hereinbefore described occurred, and due appraisement of the respective interests of your petitioners in the amount of freight pending, if any, at the termination of the aforesaid voyage; that this Honorable Court do make an order for the payment by each of said petitioners of their said [9] respective appraised value into the court or the giving of a stipulation by each of said petitioners, with sureties for the payment thereof into court, according to the value of the respective interests of said petitioners, whenever the same shall be ordered, with interest thereon at the rate of 6% per annum from the date of said stipulation, and that this Honorable Court will, upon the filing of such stipulation or of an *ad interim* stipulation by each of said petitioners, issue or cause to be issued a monition against the said Healy-Tibbitts Construction Company and against all other persons claiming damages against your petitioners, or either of them, by reason of any loss, damage, destruction or injury, whether of or to the life of persons, or property, done, occurred, occasioned or arising upon

the voyage aforesaid, citing them, and each of them, to appear before this Court and make due proof of their respective claims at or before a time to be designated in said writ, according to the law and rules and practice of this Court, and that this Honorable Court also enjoin or otherwise restrain prosecution of any and all suit or suits, action or actions, libel or libels, or legal proceedings of any manner or description whatsoever, except in the present proceedings, against your petitioners, or either of them, in respect to any injuries, losses, damages, destructions, and any and all claims occurring or arising upon or in connection with the voyage aforesaid, or by reason of said collision, and that this Honorable Court do adjudge that neither of your said petitioners is or are liable to any extent for any loss, damage, destruction or injury, but if or in the event this Honorable Court should adjudge that your petitioners, or either of them, is [10] liable to any extent therefor, that such liability of each of your petitioners be limited to the amount or value of each of your petitioners' respective interests in said steam tug "Falcon," her engines, boats, boilers, tackle, apparel, furniture, etc., at the termination of the aforesaid voyage, and freight pending, if any, at the termination of said voyage, as hereinbefore in this petition set forth, and that such values may be determined by the appraisements of said interests, as hereinbefore prayed, and that in the event of either of your petitioners being held liable, the money paid or secured to be paid into Court by each, as afore-

said, be divided and prorated among the several claimants against each petitioner in proportion to the amount of their respective claims, duly approved and confirmed, saving to all parties any priority to which they may be legally entitled, and that your petitioners, and each of them, have such other and further relief as may be deemed meet and just in the premises.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON & GREENE,
Proctors for Petitioners. [11]

State of California,
City and County of San Francisco,—ss.

A. R. Bradley, being duly sworn, deposes and says:

That he is an officer, to wit, the Secretary of Shell Oil Company, a corporation, petitioner herein; that he has read the foregoing petition, knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

A. R. BRADLEY.

Subscribed and sworn to before me this 25th day of March, 1929.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 25, 1929. [12]

AMENDMENT TO PETITION.

To the Honorable, the Judges of the Above-entitled Court:

Come now petitioners above named and amend their petition on file herein as follows: Strike out the allegations of Article VIII of said petition and add in lieu thereof the following:

> "VIII. That said Barge "Martinez," which at all of said times was owned by petitioner Shell Oil Company, had no motive power of her own or any means of propulsion. That said barge was equipped with steering-gear and had her own crew on board. That said barge was in tow of said Tug 'Falcon'` on a hawser and the master of said tug was in complete charge and control of the navigation of both vessels. That said barge was helpless, could not have taken any action to prevent the collision and was entirely free from fault in the premises."

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON & GREENE,
Proctors for Petitioners. [13]

State of California,
City and County of San Francisco,—ss.

A. R. Bradley, being first duly sworn, deposes and says: That he is an officer, to wit, the Secretary of Shell Oil Company, a corporation, one of the

petitioners herein; that he has read the foregoing amendment to petition on file herein, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

A. R. BRADLEY.

Subscribed and sworn to before me this 22 day of April, 1929.

[Seal] FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Service of the within amendment and receipt of a copy thereof admitted this 22 day of April, 1929.

WILLIAM DENMAN and
EDWIN T. COOPER,
Proctors for Healy Tibbetts.

Filed Apr. 22, 1929. [14]

ORDER FOR ISSUANCE OF MONITION AND RESTRAINING ORDER.

It appearing to this Court that a petition has been filed herein by the above-named petitioners, praying for exoneration from or limitation of liability for any injury, loss, or damage of whatsoever nature occasioned or incurred upon or arising out of or in connection with that certain voyage of the steam tug "Falcon" referred to in said petition; and said petition stating the circumstances on which such exoneration from or limitation of liability are

claimed, and on reading and filing the affidavits of value of said steam tug "Falcon" and her equipment as of the 23d day of July, 1928, verified the 25th day of March, 1929, and filed herein March 25th, 1929, and the *ad interim* stipulations executed by each of petitioners March 25, 1929, with the American Employers' Insurance Company as surety thereon, in the sum of Four Thousand (4000) Dollars, with interest from the 25th day of March, 1929, undertaking to pay into court the [15] amount or value of each of petitioners' interests in said steam tug "Falcon" and her pending freight, if any, when ordered by the Court, or to file in this proceeding a bond or stipulation for value, in the usual form with surety, in said amount, and that pending the payment into court of the amount or value of petitioners' interests in said steam tug "Falcon" and her pending freight, as ascertained, if any, or the giving of a stipulation for value thereof, the said bond to stand as security for all claims in said limitation proceeding; and

It appearing in said petition that a claim has been made by the Healy-Tibbitts Construction Company against said petitioners for damages in the amount of Forty-one Thousand Five Hundred Seventy-eight and 25/100 (41,578.25) Dollars, for damage alleged to have been done because of a collision with Pier 45 on the voyage referred to in said petition; and

It further appearing that prayer is made in said petition for the issuance of a monition against the said Healy-Tibbitts Construction Company and

against all persons claiming damages against said petitioner, or either of them, by reason of any loss, damage, destruction or injury, whether of or to the life of persons or property, done, incurred, occasioned or arising out of the voyage aforesaid, and citing them, and each of them, to appear before this Court and there make due proof of their respective claims, and also to appear and answer the allegations in said petition; and

It further appearing that prayer is made in said petition that this Honorable Court issue its order or injunction restraining the further prosecution of any actions commenced against petitioners, or either of them, and the commencement and prosecution hereafter of any and all suit or suits, action [16] or actions, or legal proceedings of any nature or description whatever, against your petitioners, or either of them, arising out of or in connection with the said voyage referred to in said petition and/or the collision with said Pier 45 referred to therein.

And the Court being fully advised in the premises,—

NOW, THEREFORE, IT IS HEREBY ORDERED that a monition issue out of this court against the said Healy-Tibbitts Construction Company and against all persons claiming damages against said petitioners, or either of them, by reason of any loss, damage, destruction or injury, whether of or to the life of persons or property, done, incurred, occasioned or arising out of the voyage aforesaid or the collision aforementioned on the

23d day of July, 1928, citing them to appear before this Court and make due proof of their respective claims on or before a certain date named in said writ not less than thirty (30) days from the issuance of the same, and also citing them to appear and answer in said cause, and Francis Krull, Esquire, is appointed Commissioner before whom proof of all claims which may be presented pursuant to said monition shall be made, subject to the right of any persons or parties to controvert or question the same; and

IT IS FURTHER ORDERED that public notice of such monitions shall be given, as in other cases, by publication thereof in "The Recorder," a newspaper published in the City and County of San Francisco, State of California, and

IT IS FURTHER ORDERED that further public notice of said monition and the issuance of the same shall be given by the posting of copies of said monition in three (3) public places in the City and County of San Francisco; and [17]

IT IS FURTHER ORDERED that service of said monition and of this order, be made upon Healy-Tibbitts Construction Company by serving a copy thereof upon Edwin T. Cooper, Esquire, its attorney, at his office in the Crocker Building at 620 Market Street, San Francisco, California, at least ten (10) days before the return day of said monition; and

IT IS FURTHER ORDERED that the beginning or prosecution of any and all suit or suits, action or actions, or legal proceedings of whatever

nature or description against your petitioners, or either of them, except in the present proceeding, in respect of any claim or claims for damages by reason of any loss, damage, destruction or injury, whether of or to life or to persons or property, done, occasioned, incurred or arising out of that certain voyage of the steam tug "Falcon" described in said petition, and/or the said collision with Pier 45 referred to therein, be and the same are and each of them is hereby restrained and enjoined; and

IT IS FURTHER ORDERED that the service of this order as a restraining order be made within this and in any other district of the United States by delivery by the Marshal of the United States for such District of a certified copy of this order to the person or persons or parties to be restrained, or to the attorneys or proctors acting in their behalf.

Dated: March 25th, 1929.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Mar. 25, 1929. [18]

MARSHAL'S RETURN TO MONITION.

I do hereby certify and return that in obedience to the monition issued out of the above-entitled court in this proceeding, under date of March 25, 1929, I gave public notice of said monition by causing the annexed citation and notice of monition setting forth the substance of said monition, to be

published in "The Recorder," a newspaper published in the City and County of San Francisco, State of California, daily, for three (3) days, and thereafter once a week until the return day of said monition, to wit, April 11th, 12th, 13th, 20th, 27th, May 4th, 11th, 18th and 25th, 1929, the first publication being at least thirty (30) days before the return day of said monition. Publisher's affidavit of publication is annexed hereto in support hereof.

I do further certify and return that I gave further notice of said monition by causing copies of said citation and notice of monition to be posted in three public places in the City and County of San Francisco, State of California, to wit, by posting the same in public places in the United States Post Office Building, the City Hall, and the Hall of Justice, in the City and County of San Francisco, State of California.

I further certify that monition, notice of monition, citation, and order for issuance of monition and restraining order were served upon Edwin T. Cooper, Esquire, attorney for [19] Healy-Tibbitss Construction Company, by delivering to and leaving with said Edwin T. Cooper at San Francisco, in said district, on the 28th day of March, 1929, a true and correct copy of said documents.

I further certify that monition, notice of monition, citation, and order for issuance of monition and restraining order were served upon Healy-Tibbitts Construction Company by delivering to *an* leaving with J. H. Edwards, said company's secretary, at San Francisco, in said district on the 26th

day of March, 1929, a true and correct copy of said documents.

And as commanded in said writ of monition, I return the same herewith, together with the citation issued in said matter and the said notice of monition.

Dated this 31st day of May, 1929.

FRED L. ESOLA,

United States Marshal for the Northern District of California.

By FRED S. FIELD,

Deputy. [20]

MONITION.

The President of the United States of America to The Marshal of the United States for the Northern District of California, GREETING:

WHEREAS, a petition has been filed in the District Court of the United States, for the Northern District of California, Southern Division, in the above-entitled matter on the 25th day of March, 1929, by petitioners above named, the first named as charterer and operator of the steam tug "Falcon" and the last named as principal stockholder of Shell Oil Company, praying for exoneration from or limitation of their respective liabilities concerning any and all loss, damage or injury, either to persons, parties or property, or by reason of loss of life, occurring or arising upon, out of or in connection with that certain voyage of said steam tug "Falcon," terminating at the time of the collision referred to in said petition at San Francisco, Cali-

fornia, on the 23d day of July, 1928, for the reasons and causes in said petition mentioned, and praying that a monition of this Court in that behalf be issued and that all parties and persons claiming damages for any loss, damage or injury of any character whatsoever may be thereby cited to appear before said Court and make due proof of their respective claims; and all proceedings being had, and if it shall appear that the petitioners, or either of them, are not liable for any such loss, damage or injury, it may be so finally decreed by this Court; and

WHEREAS, each of said petitioners has filed in the office of the Clerk of this court an *ad interim* stipulation in the sum of four thousand dollars ($4,000), with interest from the 25th day of March, 1929, undertaking to pay into court the appraised amount or value of their respective interests in said steam tug and freight pending, if any, or to file in this proceeding a bond or stipulation in said amount for value, in [21] the usual form, with American Employers' Insurance Company as surety thereon; and the said Court having directed by an order made and entered on the 25th day of March, 1929, that a monition issue against all persons, and particularly Healy-Tibbitts Construction Company, claiming damages against said petitioners, or either of them, by reason of any loss, damage, destruction or injury, whether of or to the life of persons or property, done, incurred, occasioned or arising out of the voyage named in the petition on file herein and/or the collision referred to in said petition,

which occurred on the 23d day of July, 1928, citing them, and each of them, to appear before this Court and make due proof of their respective claims on or before a certain day named in said writ,—

NOW, THEREFORE, all persons and parties claiming damages against petitioners, or either of them, by reason of any loss, damage, destruction or injury, whether of or to the life of persons or property, done, incurred, occasioned or arising out of that certain voyage of the steam tug "Falcon," referred to in said petition in file herein, on the 23d day of July, 1929, and/or the collision referred to in said petition occurring on said day, are directed and admonished to appear before this Court and make due proof of their respective claims; and we do hereby empower and strictly command you to cite all persons and parties claiming damages against petitioners, or either of them, by reason of any loss, damage, destruction or injury, whether of or to the life of persons or property, done, incurred, occasioned or arising out of or in connection with the voyage aforesaid or the collision aforementioned, which occurred on the 23d day of July, 1928, to appear before said Court and make due proof of their respective claims before Francis Krull, Esq., Commissioner, at his office in the Post Office Building, corner of Seventh and Mission Streets, in the City and County of San Francisco, on or before the 30th day of May, 1929, at ten o'clock A. M. of said day; and [22]

YOU ARE ALSO HEREBY COMMANDED to cite all such claimants to appear and answer the

allegations of the petition herein on or before the said last named date, or within such further time as the Court may grant, and to have such relief as may be due.

And what you have done in the premises do then make return to this Court, together with this writ.

WITNESS the Honorable HAROLD LOUDERBACK, Judge of the District Court of the United States for the Northern District of California, this 25 day of March, in the year of our Lord one thousand nine hundred and twenty-nine, and of our Independence the one hundred and fifty-third.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, for the Northern District of California.

By C. W. Calbreath,
Deputy Clerk. [23]

NOTICE OF MONITION.

To Whom It may Concern:

YOU ARE HEREBY NOTIFIED that on the 25th day of March, 1929, a monition was issued in the above matter by the above-entitled court against all persons claiming damages by reason of injuries to persons or property or for loss of life occurring upon or in connection with or arising out of that certain voyage of the steam tug "Falcon" terminating at the time it collided with Pier 45 in the Bay of San Francisco, State of California, on the 23d day of July, 1928, directing such persons to appear before the above-entitled court and make due proof of their respective claims and commanding

me to cite such persons to appear before the said Court and make due proof of their respective claims before Honorable Francis Krull, Commissioner, on or before the 30th day of May, 1929, at 10 o'clock in the forenoon of said day; and also commanding me to cite such persons to appear and answer the allegations of the petition herein on or before said date or within such further time as may [24] be granted by the Court.

Dated: San Francisco, California, March 25th, 1929.

FRED L. ESOLA,
United States Marshal for the Northern District of California.

By FRED S. FIELD,
Deputy. [25]

CITATION.

United States of America,
Northern District of California,—ss.
To Whom It may Concern:

WHEREAS, a petition was filed in the Southern Division of the United States District Court, for the Northern District of California, on the 25th day of March, 1929, by Shell Oil Company, charterer of the steam tug "Falcon," and Shell Union Oil Corporation, principal stockholder of Shell Oil Company, praying for exoneration from or limitation of their liability concerning any and all loss, damage or injury, either to persons or to property, or by reason of loss of life, occurring upon or in

connection with, or arising out of, that certain voyage of the said steam tug "Falcon," terminating on the 23d day of July, 1928, more particularly described in the petition on file herein; and

WHEREAS, each of said petitioners has given an *ad interim* stipulation to abide by and pay any sum awarded by final decree rendered by the District Court or by an Appellate Court, if an appeal intervene, to the amount of each of said petitioners' [26] duly appraised interest in said vessel, her engines, boilers, boats, tackle, apparel, furniture, etc., and her freight pending, if any,—

NOW, THEREFORE, in pursuance of a monition issuing out of said court, to me directed and delivered, I do hereby cite all corporations, persons and parties claiming damages for any loss, damage or injury, either to persons or to property, or because of loss of life, occurring upon or arising out of or in connection with that certain voyage of said steam tug "Falcon" terminating as aforesaid at the Port of San Francisco, on the 23d day of July, 1928, to appear before said Court and make due proof of their respective claims before the Honorable Francis Krull, United States Commissioner, at his office in the Post Office Building, at the corner of Seventh and Mission Streets in the City and County of San Francisco, State of California, on or before the 30th day of May, 1929, at 10:00 o'clock in the forenoon of said day, and to answer the allegations of the petition herein on or before said last-named date; otherwise they will be in default and barred from participating in said

suit or proceeding, or having any claim against the said petitioners, or either of them, adjudicated.

Dated: San Francisco, California, March 25th, 1929.

FRED L. ESOLA,

United States Marshal for the Northern District of California.

By FRED S. FIELD,

Deputy.

FARNHAM P. GRIFFITHS,

McCUTCHEN, OLNEY, MANNON & GREENE,

Proctors for Petitioners,

Balfour Building, San Francisco, California.

[27]

REPORT OF U. S. COMMISSIONER ON VALUATION, ETC.

To the Honorable The District Court of the United States for the Northern District of California, Southern Division—In Admiralty—and the Judges Thereof:

Pursuant to an order made in the above-entitled matter referring the same to me to appraise the value of the steam tug "Falcon," her engines, boilers, boats, tackle, etc., at the end of the voyage mentioned in the petition for limitation of liability filed in the above-entitled matter and the freight, if any, then pending, and the interest of petitioners therein, I have to report that pursuant to the stipulation of

the parties hereunto attached and hereby referred to and made a part hereof, I do find and report:

> "That the value of the tug 'Falcon' at the time of the collision of her tow, the 'Martinez,' with Pier 45 in July, 1928, was Three Thousand Dollars ($3,000), and that the said tug had then no freight pending for the voyage on which the collision occurred; that the value of the Shell Oil Company's interest as charterer in said tug at said time was Three Thousand Dollars ($3,-000); that the Shell Union Oil Corporation owns all the stock of said Shell Oil Company, and that in so far as said stock represents ownership of an interest in said vessel at said time, it is valued at one hundred per cent (100%) of the value of Shell Oil Company's interest in said tug."

All of which is respectively submitted.

Dated: May 1, 1929.

FRANCIS KRULL,
Commissioner.

[Endorsed]: Filed May 13, 1929. [28]

PETITION FOR INTERLOCUTORY DECREE ANNULLING OR MODIFYING RESTRAINING ORDER, TO PERMIT FILING OF SUITS AND AUTHORITIES SUPPORTING SAME.

To the Honorable HAROLD LOUDERBACK, Judge of the United States District Court, in the Southern Division, for the Northern District of California—In Admiralty:

The petition of Healy Tibbitts Construction Company, a corporation, hereinafter called the Healy Company, appearing herein specially and exclusively for the purpose hereof, alleges, as follows:

I.

That although the petitioners for limitation, hereinafter called the Shell Companies, here seek limitation of or exoneration from liability as charterers and operators of only the steam tug "Falcon," this court has issued its restraining order in terms broad enough to restrain suits on claims against them as owners and operators of the separately managed and power-steered barge "Martinez" arising out of the acts of the said barge as an offending vessel. That said restraining order, of date March 25, 1929, accomplished this, is apparent from the following language of the order of this court: [29]

"IT IS FURTHER ORDERED that the beginning or prosecution of any and all suit or suits, action or actions, or legal proceedings of whatever nature or description against your petitioners, or either of them, except in the present proceeding, in respect of any claim or claims for damages by reason of any loss, damage, destruction or injury, whether of or to life or to persons or property, done, occasioned, incurred or arising out of that certain voyage of the steam tug "Falcon" described in said petition, and/or the said collision with Pier 45 referred to therein, be and the same are and each of them is hereby restrained and enjoined; and"

That the jurisdiction of this Court "attaches *in rem* and *in personam* by reason of the custody of the *res* put by the petitioner in its hands." (Taft.)

Hartford Acc. Co. vs. S. P. Co., 273 U. S. 207, at 217; 71 L. Ed. 612, at 616.

That the *res* is the vessel against which default is charged, here, as shown *infra,* the "Martinez," made directly liable for her offenses, by Section (813) of the Code of Civil Procedure.

Until the "Martinez" becomes a *res* in the possession of this Court, it has no jurisdiction over controversies *in rem* against her or *in personam* for her acts as an offending vessel.

II.

That the barge "Martinez," mentioned in the petition for limitation of liability filed herein, was during her voyage to and at the time of the damage to Pier 45, described in said petition, and is now, a vessel having a crew of her own and having a steering gear controlled by machine power from her pilot-house, and was, at the time of striking the said pier, proceeding on a single hawser behind the tug "Falcon," and managed, controlled and steered by said barge's crew and steering gear. [30]

III.

That a separately officered and manned, power-steered barge, trailing behind a tug, may well be an active instrument and be liable *in rem* and her owners *in personam* for the barge's offenses, as distinguished from the sole fault of the tug, has been repeatedly held by the United States Supreme Court in the following cases:

The Virginia Ehrman vs. Curtis (1877) 24 L. Ed. 890.

A tug was towing a sailing vessel out through a narrow channel and collided with and sank a dredge anchored and working in the channel. The tug sought to excuse herself by blaming the vessel, and *vice versa.* The tug starboarded her helm just in time to avoid the collision. The vessel apparently had no lookout and ported when she should have starboarded her helm. The tug was also held at fault for going out in the channel so close to the dredge. The opening statement of the opinion by

Judge Clifford is interesting as a general statement of the law:

> "Shipowners, if their ship is without fault, are entitled in a cause of collision, except where it occurs from inevitable accident, to full compensation for the damage their ship receives, provided it does not exceed the value of the offending vessel and her freight then pending; and the same rule applies where the injury is caused by the joint action of a tug and tow, if it be so alleged in the libel, and it appears that both were in charge of their own master and crew, and that each was in fault in not taking due care, or was guilty of negligence or of unskillful or improper navigation." (891.)

The Maria Martin vs. Northern Trans. Co.,

20 L. Ed. 251, 254, 255. (Clifford, J.)

Tug was towing a sailing vessel. In passing a steamer the helmsman of the sailing vessel thought the order to port was one to starboard preparatory [31] to casting off, since the vessels were about in the place usual for casting off. It was this fault in steering that caused the collision. The tow alone was held at fault. She had her own master and crew on board.

The Mabey and The Cooper (1871) 20 L. Ed.

881. (Clifford, J.)

The "Cooper," a ship, was about to go to sea. A tug was engaged but those in charge of the tug said it was dangerous to leave at the time desired by the ship due to strong ebb tide and ice floe. The ship

owners insisted and agreed to save the captain of the tug harmless if there was a loss. The Court said:

> "Want of due care is shown in the fact that the ship went to sea at a moment when the master of the tug which had her in tow knew that it was not safe in view of the condition of the weather and tide; nor can the tug be held blameless any more than the ship, because the master ultimately yielded to the importunities of the owners of the ship and assumed the risk, subject to his claim on the owner of the ship for indemnity. Faulty navigation is also shown, which of itself is sufficient answer to the defense of inevitable accident." (882)

That the distinction between (1) a barge lashed hard and fast to the structure of a tug, thus moving helplessly into collision under the tug's power and direction and having no mobility of her own requiring management and navigation, and (2) a barge trailing behind a tug, the barge navigating her course to conform to that of the tug by the control of the barge's officers and crew through her steering gear, is one of elementary maritime law.

In the former case the doctrine of *res ipsa loquitur* may apply or the Court, on the admitted facts, hold the tow as a mere passive instrument and her owners, as such, free of any possible claim of liability. Such is the decision of

> Liverpool & etc. Nav. Co. vs. Brooklyn E. D. Terminal, 251 U. S. 48; 64 L. Ed. 130. [32]

In that case Mr. Justice Holmes relies on the case of the Eugene F. Moran, 53 L. Ed. 600, also decided by him, where a tow not lashed alongside, but trailing behind a tug, as here the "Martinez," was held liable for her wrongful management as to her towing lights, which deceived the opposing vessel as to her whereabouts as she moved on her towline behind the tug. That the principle established applies as well to other offending acts of management and navigation of a trailing tow.

IV.

That the Healy Company has had and made since the said damage to said Pier 45, and now has and makes a claim *in rem* against the said barge "Martinez" and a claim *in personam* against the owners thereof, in the sum of $41,578.25, arising out of and for said damage to said Pier 45, belonging to said Healy Company, based upon the negligent management, handling and steering of said barge, as an active and not passive instrument of the Shell Companies, and the officers and crew of said barge, which proximately and materially contributed to and caused said damage to said pier.

V.

That, prior to the filing and commencement of this said limitation proceeding, the Shell Companies were advised by the Healy Company that said Healy Company had and made a claim against said barge "Martinez" and its owners *in rem* and *in personam* because of said offenses of said barge.

VI.

That, despite said knowledge of said claim arising from the offenses of the "Martinez," said Shell Companies have failed to disclose said claim in their said petition, and have kept from the Court the said material fact regarding the claim arising from the collision with Pier 45, and have not surrendered or offered to surrender said barge "Martinez," or given, or offered to give, any stipulation for the value of the said barge, but obtained from this court of equity the said restraining order in terms so broad as to prevent the prosecution [33] of said claim, without the disclosure of said claim, or the making of said surrender, or the giving of such stipulation.

VII.

That the claims arising from the damage to said Pier 45 by the striking thereof by said barge are not within the cognizance or jurisdiction of the Admiralty Court of the United States, but are exclusively within the jurisdiction of the courts of the State of California, except and until "the custody of the *res,*" the "Martinez," "has been put, by the Shell Companies, in the "hands" of this court. That the State of California, and particularly Sections 813 to 827 of the Code of Civil Procedure of said state, grants a right of action *in rem* to said Healy Company against said offending vessel, said barge "Martinez," for said damage to said pier. That section 714 of said Code requires that said right *in rem* shall be asserted in "actions * * * against the owners by name," thus bringing such

actions within the scope of said restraining order, so granted in excess of the Court's jurisdiction. That the laws of said state also grant to said Healy Company a right of action *in personam* against the corporate owner of said barge and its stockholders therefor, and that in each and both such causes of action said Healy Company would be entitled, under the laws of said state of California, to a jury trial of the issues thereof.

VIII.

That the right to maintain these limitation proceedings and to enjoin suits in other tribunals is founded and preconditioned, under the laws of the United States, upon the surrender of the vessel charged with the offense on which the claim is based, or a stipulation for its value, and that said Healy Company makes claim against said barge as such offending vessel. That the value of said tug "Falcon," which said Shell Companies offer to surrender, is nominal and would not meet more than a small percentage of the claim of this said petitioner. That the value of said barge substantially exceeds the entire claim of said Healy Company. That said attempt to prevent suit based on offenses of the barge and her [34] owners for such offenses, by the mere offer of the relatively nominal value of the tug is a subterfuge and evasion. It is an attempt to deprive the Healy Company of the right to adjudicate its claims *in rem* and *in personam* in a State Court and by trial by jury, without giving the consideration, i. e., the barge against

which the Healy Company's claim exists, required by the statute.

IX.

That in addition to the said claim of the Healy Company against the Shell Companies for the offenses of their said barge "Martinez," the Healy Company has a claim against the Golden Gate Ferry Company for its joint negligence with that of the barge "Martinez" and her owners, based upon the negligence described in the petition of the Shell Companies. That under the laws of the State of California the Healy Company may, in a single action, join the Shell Companies and the Golden Gate Ferry Company and try, in one trial, its claims against them for their alleged joint negligence and obtain a complete disposition of the controversy or controversies arising from said claim of joint negligence. That by reason of the said restraining order, so improvidently issued, and so beyond the jurisdiction of the Court to grant, the Healy Company would be compelled to try piecemeal, in different suits, its claim against the Ferry Company and its said claim against the Shell Companies, although arising from their joint negligence. That said claim of the Healy Company against the Golden Gate Ferry Company is not cognizable in admiralty because arising from an injury to a fixed land structure. That it is not a claim that can be heard in this limitation proceeding because there has been no surrender of the ferry-boat contributing to the joint negligence upon which said claim is based. That it is not a cause of action arising out

of the act of the "Falcon," but out of the acts of the ferry against which, and her owners, it is claimed. That as a result, instead of this limitation proceeding avoiding a multiplicity of suits with reference to the claimed offenses of the said barge "Martinez," it is, in fact, multiplying litigation, contrary to the equitable purposes of the Act of Congress, to the great and unnecessary harm to the Healy Company. [35]

That in the event the Shell Companies were able to compel the Healy Company to await until the decision of this Court and of the United States Circuit Court of Appeals, and possibly of the Supreme Court, upon the question of the responsibility of the "Falcon," and they finally establish that the "Falcon" was not responsible in any way and that they, as such petitioning charterers and operators thereof, were not responsible, such decision may well be made without deciding as to the responsibility of the barge "Martinez" and the Healy Company would then be compelled to litigate its claim against the barge "Martinez" and her owners in a State Court after several years time had elapsed from the occurrence of the collision. Such a procedure, instead of avoiding a multiplicity of suits, creates a multiplicity of suits and seriously imperils the chances of the Healy Company of making its proper proof to establish its claim either *in rem* or *in personam*.

Or, in the event that the Court should find that the barge "Martinez" was responsible, as charged, the Healy Company would have no lien upon her

because there is no lien on her cognizable in admiralty or enforcible in this proceeding. The only method by which the Healy Company's lien upon the "Martinez" is assertable is through the attachment of the common law Superior Court of the State of California through process served by the sheriff of the county issued out of said Superior Court. That during the period of the delay occasioned by the injunction so wrongfully obtained, the said barge may have been destroyed or transferred to innocent purchasers and the assertion of said lien as a right of the Healy Company be forever lost. [36]

X.

That said Healy Company has been served with the order for issuance of monition and restraining order, signed and issued in the above-entitled limitation proceeding, and said Healy Company is prepared to and desires to pursue its remedies, in the courts of and under the laws of the State of California, against said barge "Martinez" and/or its owners, for the damage to its said pier, claimed by said Healy Company to have been caused by the negligent management and navigation of said barge "Martinez."

XI.

That, by reason of the failure to disclose the true claim of said Healy Company, and, by reason of the failure to surrender or offer stipulation for the value of said barge "Martinez," petitioner, Healy Company, respectfully alleges that said restraining order was without the jurisdiction of this Court to

make, and was improvidently and inadvertently made and issued, so far as the same restrains said Healy Company from proceeding against said barge and its owners in the Superior Court of the State of California, pursuant to the laws thereof, to recover said damage to its said pier caused by the offenses of said barge, and that said restraining order should be amended and modified so as to permit such proceedings by said Healy Company, relative to the offenses of the barge "Martinez," as it may be advised.

XII.

That, after the filing of the said limitation proceeding and the service of said monition and restraining order, the proctors for the Healy Company again advised said proctors for the Shell Companies of the claim of this said petitioner and of their failure to set forth the same in their said petition, and of the fact that they had not surrendered, or offered to surrender, or stipulated for the value of said barge, and requested that they amend said petition for limitation to disclose the nature of the claims arising from the offenses of the barge "Martinez," but said Shell Companies have declined so to do, [37] and have asserted that the said restraining order should stand, despite such failure to disclose such facts in seeking and procuring *ex parte* such extraordinary relief, depriving the said Healy Company of its state forum and jury.

XIII.

That although the restraining order so prevents a

state suit based on the offenses of the barge "Martinez," causing the collision with Pier 45, nevertheless the citation issued herein is confined to claims arising from the voyage of the tug "Falcon," and the Healy Company thus has its hands tied on claims it is not summoned or cited to present in this forum.

XIV.

That the said restraining order was issued by this Court without any "due" appraisement of the steam tug "Falcon." That Rule 53 of the United States Supreme Court requires that there shall be a due appraisement and filing of a stipulation or bond in the appraised amount as a prerequisite to the issuing of the injunction and that the rules of this court require that such appraisement shall be upon notice and after hearing in which the claimant shall participate. That the said rule of this District Court requiring said appraisement is as follows:

"RULE 53.

Creditors and Lienors, When to be Stated in Petition.

If, instead of a surrender of the vessel, and appraisement thereof be sought for the purpose of giving a stipulation for value, the libel or petition must state the names and addresses of the principal creditors and lienors, whether on contract or in tort, upon the voyage on which the claims are sought to be limited, and the amounts of their claims, so far as they are known to the petitioner,

and the attorneys or proctors in any suits thereon; or if such creditors or lienors be numerous, then a sufficient number of them properly to represent all in the appraisement; and notice of the proceedings to appraise the property shall be given to such creditor as the Court shall direct, [38] "and to all the attorneys and proctors in such pending suits."

That no said hearing was had and no appraisement made.

That notice of said claim was given to the Shell Companies more than three and one-half months prior to the filing of the petition for limitation and the issuance of the injunction. That no reason is shown, nor is there any existing, requiring precipitate action on the part of this court, such as the issuance of the restraining order without appraisement provided for by the rules, and no reason exists herein, or is there cause shown, for the giving of an *ad interim* stipulation, and that such restraining order issued thereon is null and void.

WHEREFORE, this petitioner, appearing specially therefor, prays that said restraining order be quashed as a whole if the Court hold that it was improvidently issued and if not so held that it be amended and modified so as to allow this said petitioner to pursue and enforce its claims and alleged rights of action in the courts of the State of California, against said barge "Martinez," and its corporate owners, and the stockholders thereof, *in rem* and/or *in personam* for offenses committed by said barge, as it may be advised, and for such other and

further relief as may in the premises be deemed meet.

HEALY TIBBITTS CONSTRUCTION COMPANY,

Petitioner,

Appearing Specially as Above and not Generally.

WILLIAM DENMAN,

EDWIN T. COOPER,

Proctors for Petitioner, Healy Tibbitts Construction Company, a Corporation, Appearing Specially as Above and not Generally. [39]

State of California,
City and County of San Francisco,—ss.

William H. Healy, being first duly sworn, deposes and says:

That he is the President of Healy Tibbitts Construction Company, a corporation, petitioner in the foregoing petition; that he has read the allegations thereof and that the same are true of his own knowledge, save where therein stated upon information and belief and, as to such allegations, he believes them to be true.

WILLIAM H. HEALY.

Subscribed and sworn to before me this 6th day of April, 1929.

[Seal] KATHRYN E. STONE,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Due service and receipt of a copy of the within petition is hereby admitted this 8th day of April, 1929.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON & GREENE,
Proctors for ————.

Filed Apr. 8, 1929. [40]

AMENDMENT TO PETITION FOR INTERLOCUTORY DECREE ANNULLING OR MODIFYING RESTRAINING ORDER, TO PERMIT FILING OF SUITS AND AUTHORITIES SUPPORTING SAME, AND STIPULATION THEREON.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that Paragraph IV of the above petition for modification of the restraining order shall at all times be deemed to have contained the following additional allegations:

"That the said negligent management, handling and steering of the said barge 'Martinez' included (a) The negligent dispatching by the shore management of the Shell Company of the said barge for her voyage through the space between Pier 45 and the ferry slip in the then condition of the wind and tide; (b) the negligent steering of the barge 'Martinez' prior to the emergence of the ferry, as alleged in the petition for limitation herein, whereby said barge 'Martinez' was not steered behind her tug but was steered too far to the easterly and too near to Pier 45, whether or not interfered with by

the ferry; (c) That after the emergence of the ferry the barge was steered negligently in this, that she failed to use her remaining headway to steer her to bring her parallel to the pier and thereby [41] minimize the damage, her failure so to do causing her to hit a much sharper dragging blow with her after starboard corner against a succession of piles, and that each of the above faults proximately contributed to the collision; that the Healy Company will make its defense and deny each of the above specifications of negligence; that the trial of the suit of the Healy Company, in the State Court, against the 'Martinez' and her owners, if not enjoined, will include the issues created by these allegations and denials; that in addition to the embarrassments and invasions of right created by the said Restraining Order, and hereinafter described, will be the probable loss of witnesses on behalf of the Healy Company during the period of the pendency of the said petition for limitation in this District Court and in the Circuit Court of Appeals, and its possible period of certiorari to the Supreme Court of the United States."

April 23d, 1929.

McCUTCHEN, OLNEY, MANNON & GREENE,

Proctors for Shell Oil Company and Shell Union Oil Corporation, Petitioners for Limitation.

WILLIAM DENMAN,

E. T. COOPER,

Proctors for Petitioner, Healy Tibbits Construction Company, Appearing Specially, as Heretofore, and not Generally.

[Endorsed]: Apr. 23, 1929. [42]

DECREE OF DEFAULTS.

This Court having heretofore issued a monition against Healy-Tibbitts Construction Company, a corporation, and against all persons and parties claiming damages from petitioners, or either of them, by reason of any loss, damage, injury or destruction, done, occasioned, or incurred upon or arising out of the voyage of the steam tug "Falcon" referred to in the petition herein, and/or arising out of or by reason of the collision which occurred on the 23d day of July, 1928, between the barge "Martinez" which was in tow of the tug "Falcon," and Pier 45, more particularly described in the said petition herein, citing them and each of them, and commanding the United States Marshal for the Northern District of California to cite them and each of them to appear before this Court and make due proof of their respective claims before Francis Krull, Esquire, the United States Commissioner for the Northern District of California, on or before the 30th day of May, 1929, at the hour of ten o'clock A. M. of said day; and

It appearing from the records and files herein that on the 28th day of March, 1929, a copy of the restraining order and order for monition, monition, notice of monition, and citation in this proceeding was duly served upon Edwin T. Cooper, Esquire, attorney for Healy-Tibbitts Construction Company, a corporation, and on March 26, 1929, upon said Healy-Tibbitts Construction Company; and

It further appearing by the return filed herein by the United States Marshal for the Northern Dis-

trict of California that public notice of said monition was given by said United States Marshal causing a citation and notice of monition, setting forth the substance of said monition, to be published in "The Recorder," a newspaper published in the City and County of San Francisco, State of California, daily, for three (3) days, and thereafter, once a week until the return [43] day of said monition, the first publication of said citation and notice of monition being at least thirty (30) days before the return day of said monition, and by causing said citation and notice of monition to be posted in three (3) public places in the City and County of San Francisco, State of California; and

It further appearing by the report of Francis Krull, Esquire, that at ten o'clock A. M. on the 31st day of May, 1929, no claims had been presented and filed herein; and

It further appearing that Healy-Tibbitts Construction Company, a corporation, has by stipulation on file herein been granted thirty (30) days' additional time in which to make its claim and to except, move and/or plead to the petition herein;

NOW, THEREFORE, on motion of Farnham P. Griffiths, Esquire, and McCutchen, Olney, Mannon & Greene, proctors for petitioners,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all persons, parties, firms and corporations, except Healy-Tibbitts Construction Company, a corporation, claiming damages from petitioners, or either of them, by reason of any loss, damage, injury or destruction, whether of or to life, or person, or property, or goods or merchandise, done or occasioned or incurred upon or

arising out of the voyage of the steam tug "Falcon" which ended as set out in the petition herein July 23d, 1928, or arising out of, in connection with, or because of that certain collision referred to in said petition between the barge "Martinez" and Pier 45 on the 23d day of July, 1929, when the said barge "Martinez" was in tow of the tug "Falcon," be and they are hereby adjudged to be in default, that said defaults be and they are hereby entered; and

IT IS FURTHER ORDERED that all issues raised by the petition herein, and the answer or answers which may hereafter be filed within the time granted by stipulation of the [44] parties or by this Court, shall stand for trial before this Court according to the rules and practices thereof.

Dated: May 31st, 1929.

HAROLD LOUDERBACK,
United States District Judge.

Filed: May 31, 1929.

Entered in Vol. 24 Judg. and Decrees, at page 205. [45]

STIPULATION AND MODIFICATION ON RESTRAINING ORDER.

WHEREAS Healy-Tibbitts Construction Company, a corporation, has filed herein a motion to dissolve or modify restraining order heretofore issued herein on the 25th day of March, 1929, which motion is now under submission to the above-entitled court; and

WHEREAS said Healy-Tibbitts Construction Company wishes to file a suit against petitioners, the barge "Martinez," or any one or more of them,

in order to protect its asserted lien on or against the said barge "Martinez" under the statutes of the State of California, and

WHEREAS petitioners are willing that such suit may be filed but not tried or decided pending the final order or decree of the above-entitled court or of an Appellate Court, if an appeal be taken, on the motion and matters now under submission,—

NOW, THEREFORE, it is hereby stipulated and agreed that the order for issuance of monition and restraining order herein issued on the 25th day of March, 1929, may be and for the aforesaid limited purpose of this stipulation the same is hereby deemed [46] modified so that Healy-Tibbitts Construction Company may file any suit or suits, action or actions or legal proceedings of whatsoever nature or description against petitioners, the barge "Martinez" or any one or more of them in any court whatsoever and wheresoever situate in respect of any claim or claims for damages arising out of the collision of said barge "Martinez" referred to in the petition on file herein and caused by the fault, failure, neglect or misconduct of petitioners or their employees, or any of them, in despatching, navigating, managing, manning, equipping and supplying the said barge "Martinez."

This modification of said restraining order shall not be or be deemed to be an authorization to try or have tried or to submit for decision to any court any such suit or proceeding, permission to file which is hereby granted. Said Healy-Tibbitts Construction Company may, however, take testimony, in so far as the law and practice permit, in any such suit or proceeding so filed, but petitioners or either of

them or said barge "Martinez" shall not be required to plead to or answer any complaint or other pleading filed in any such suit against petitioners or said barge "Martinez" or any of them, and their time so to plead shall be and hereby is extended by Healy-Tibbitts Construction Company for a period of forty days after the above-entitled court enters its decision on the motion to modify or dissolve said restraining order now pending and under submission, if said motion is granted.

IT IS FURTHER AGREED that if and when the above-entitled court denies the motion of Healy-Tibbitts Construction Company now under submission and the order denying the same shall not be appealed or if appealed it is confirmed, and the Supreme Court of the United States do not reverse the same, then this stipulation and order shall be vacated and of no force and effect and the aforesaid restraining order of March 25th, 1929, shall be thereafter controlling and in full force and effect.

E. T. COOPER,
WILLIAM DENMAN,
Proctors for Healy-Tibbitts Construction Company.

McCUTCHEN, OLNEY, MANNON & GREENE,
Proctors for Petitioners Shell Oil Company and Shell Union Oil Corporation.

It is so ordered.

HAROLD LOUDERBACK,
United States District Judge. [47]

[Endorsed]: Filed Jul. 20, 1929. [48]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 19th day of October, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

(ORDER DENYING PETITION FOR INTERLOCUTORY DECREE AMENDING AND MODIFYING RESTRAINING ORDER.)

The petition for an interlocutory decree amending and modifying the restraining order, having been heretofore argued and submitted, and due consideration having been thereon had, IT IS ORDERED that said petition be and the same is hereby denied. [49]

NOTICE OF APPEAL.

To Shell Oil Company and Shell Union Oil Corporation, Petitioners Herein, and to Messrs. Farnham P. Griffiths and McCutchen, Olney, Mannon and Greene, Their Proctors:

You, and each of you, will please take notice that the Healy-Tibbitts Construction Company, the moving party, moving and petitioning for an interlocutory decree and order annulling or modifying the restraining order made by said District Court enjoining filing of suits by Healy-Tibbitts Construc-

tion Company against the barge "Martinez" and petitioners for limitation arising from injuries sustained by Healy-Tibbitts Construction Company by reason of the collision of the said barge "Martinez" with Pier 45 in San Francisco Bay, hereby appeals from that certain order and interlocutory decree made and entered herein on the 19th day of October, 1929, in favor of the Shell Oil Company and Shell Union Oil Corporation, and against the Healy-Tibbitts Construction Company, the moving party therein, and does hereby appeal from the whole of said order and interlocutory decree and from each and every part thereof to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: October 28th, 1929.

WILLIAM DENMAN,
E. T. COOPER,
Proctors for Healy Tibbitts Construction Company,
Appearing Specially Herein. [50]

[Endorsed]: Due service and receipt of a copy of the within notice of appeal is hereby admitted this 28th day of October, 1929.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON & GREENE,
Proctors for Petitioners.

Filed Oct. 30, 1929. [51]

ASSIGNMENTS OF ERROR.

Now comes the Healy Tibbitts Construction Company, a corporation, appellant, and assigns error herein as follows:

The District Court erred in holding:

I.

That in a limitation proceeding it had jurisdiction and right to enjoin the Healy Tibbitts Construction Company from bringing a State Court suit against the barge "Martinez" or against the Shell Companies, her owners and operators, because of her faults, when no appraisement was had of her value and no stipulation given and filed for her value, or at all.

II.

That the mere allegation by the owners of innocence of fault of their barge "Martinez" in their petition for limitation of liability, without the surrender of the vessel, or her appraisal, or giving a stipulation for her value, conferred jurisdiction to hear and determine the right to limit liability for damages arising from her fault or to restrain the person, claiming damages from the faults of the "Martinez," from bringing a State Court suit *quasi in rem* against the vessel or *in personam* against the owner. [52]

III.

That the mere allegation in the petition for a

limitation of liability of the innocence of the barge "Martinez" and of the innocence of her tug "Falcon" and the giving of a stipulation for the value of the allegedly innocent "Falcon," without giving such a stipulation for the "Martinez'" worth, confers jurisdiction to enjoin a suit against the "Martinez" or the Shell Companies, her owners, for faults claimed to have been actively committed by the "Martinez" by her own officers and crew as distinguished from the officers and crew of the "Falcon."

IV.

That the giving of a stipulation for $3,000, the value of the allegedly innocent "Falcon," and the failure to give a stipulation for upwards of $55,000, the value of the allegedly innocent "Martinez," confers jurisdiction to enjoin a suit for $50,000, based on the latter's own faults as distinguished from the faults of the tug.

V.

That the above-described $3,000 "Falcon" stipulation confers jurisdiction to enjoin a state suit to enforce a state statutory lien on the "Martinez" for $50,000, and thereby destroy the lien, and to compel a claim for $50,000 damage to a pier to litigate the same in admiralty where there is no lien on the "Martinez" for damages to such a land structure.

VI.

That the injunction restraining the Healy Tibbitts Construction Company from prosecution of its said claims could be issued before its suit was

filed, whereas under U. S. Supreme Court Admiralty Rule 51 such injunction can be issued only "when any ship or vessel shall be libeled or the owners thereof shall be sued."

VII.

That the owners of a vessel, without surrendering her or stipulating for her value, can obtain jurisdiction to deprive a litigant against her or them [53] (1) of his right to an unlimited recovery of damages; (2) of his right to a jury trial; (3) of his state statutory lien, not cognizable in admiralty; (4) of a joint State Court trial of claims non-maritime in character against several defendants, mostly not in the limitation proceeding, charged with joint and several fault causing the claimed damage; (5) of his state right to use the depositions of the defendants taken before the trial, and other state remedies.

WILLIAM DENMAN,
EDWIN T. COOPER,
Proctors for Healy Tibbitts Construction Company, Appearing Specially Herein.

[Endorsed]: Receipt of a copy of the within assignments of error is hereby admitted this 30th day of October, 1929.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON & GREENE,
Proctors for Petitioners.

Filed Oct. 30, 1929. [54]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 54 pages, numbered from 1 to 54, inclusive, contain a full, true and correct transcript of the records and proceedings, in the Matter of the Petition of Shell Oil Company et al., etc., for Limitation of Liability, No. 19,972, as the same now remain on file of record in this office.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of Twenty Dollars ($20.00) and that the same has been paid to me by the attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 1st day of November, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [55]

[Endorsed]: No. 5979. United States Circuit Court of Appeals for the Ninth Circuit. Healy Tibbitts Construction Company, a Corporation, Appellant, vs. Shell Oil Company, a Corporation, and Shell Union Oil Corporation, a Corporation,

Appellees. Apostles on Appeal. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 1, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5979

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HEALY TIBBITTS CONSTRUCTION COMPANY, a corporation,

Appellant,

vs.

SHELL OIL COMPANY, a corporation, charterer and operator of the Steam Tug FALCON and SHELL UNION OIL CORPORATION, a corporation, principal stockholder of Shell Oil Company,

Appellees.

APPELLANT'S BRIEF

On Appeal from Order Denying Petition to Set Aside Injunction Against a Common Law Suit in the Superior Court of the City and County of San Francisco

and

PETITION FOR ADVANCING HEARING.

(page 31)

FILED
NOV 10 1929
PAUL P. O'BRIEN,
CLERK

WILLIAM DENMAN,
Merchants Exchange Building,
San Francisco, Calif.,

EDWIN T. COOPER,
Crocker First National Bank Building,
San Francisco, Calif.,

Proctors for Healy Tibbitts Construction Company, Appellant, appearing specially below to move against the restraining order issued by the said District Court.

Parker Printing Company, 523 Clay Street, San Francisco

Summary of the Argument.

Index to Cases, Statutes and Rules.

No. 5979

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APPELLANT'S BRIEF

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and

PETITION FOR ADVANCING HEARING.

(page 31)

STATEMENT OF CASE.

This is an appeal brought by the Healy Tibbitts Construction Company from an order of the District Court below refusing to modify an injunction restraining it from bringing to issue or trial a suit in the State courts of California against the barge Martinez and her owners, the Shell Oil Company and Shell Union Oil Corporation, appellees, for faults specifically charged against the Martinez, her officers and crew. The faults are charged to have caused a collision with Pier 45 belonging to the Healy Company and situated on the north San Francisco waterfront. The damages claimed are $50,000.

The Martinez was a large seagoing tanker barge, navigated by her own officers and crew, as she trailed behind a small tug, the Falcon. Her own officers steered her with a steam powered steering gear. The faults specifically charged against her appear in the Apostles at pages 44 and 45,* as follows:

(a) The negligent dispatching by the shore management of the Shell Company of the said barge for her voyage through the space between Pier 45 and the ferry slip in the then condition of the wind and tide; (b) the negligent steering of the barge Martinez prior to the emergence of the ferry, as alleged in the petition for limitation herein, whereby said barge Martinez was not steered behind her tug but was steered too far to the easterly and too near to Pier 45, whether or not interfered with by the ferry; (c) that after the emergence of the

*The numerals in parentheses in the text are of the pages in the Apostles to which reference is made.

ferry the barge was steered negligently in this, that she failed to use her remaining headway to steer her to bring her parallel to the pier and thereby minimize the damage, her failure so to do causing her to hit a much sharper dragging blow with her after starboard corner against a succession of piles, and that each of the above faults proximately contributed to the collision.

On the 25th day of March, 1929, the Shell Oil Company and Shell Union Oil Corporation, the former's principal stockholder, filed in the District Court below a petition for limitation of or exoneration from liability for the damages inflicted on Pier 45 by the Martinez. The title of the proceeding below is as follows:

> "In the Matter of the Petition of SHELL OIL COMPANY, a corporation, **charterer and operator of the Steam Tug Falcon,** and SHELL UNION OIL COMPANY, a corporation, principal stockholder of SHELL OIL COMPANY, for exoneration from or limitation of liability. } No. 19972 L."

Although so petitioning only as owners of the small tug Falcon, the petition sought limitation of and exoneration from liability for the damage inflicted by the large seagoing barge. The petition for limitation, as amended, admitted that the power steered barge Martinez was navigated by her own officers and crew while trailing on a hawser behind the tug. The petition also alleged *both* the barge and the tug to be innocent of wrong doing and attributed the collision to the fault of a ferryboat, which

is alleged to have crossed ahead and impeded the navigation of the two vessels and caused the collision of the Martinez with the pier.

The petition also shows but one claim, that of the Healy Tibbitts Construction Company. It alleged a threatened suit by the Healy Company of upwards of $40,000 for the damages inflicted by the Martinez, which, having been caused to collide with a fixed land structure, was presumptively in fault. All the authorities agree that this presumption casts the burden of proof upon a trailing tow navigated behind a tug, to show that it was not the tow's fault which caused a collision with a moored vessel or a dock.

The Virginia Ehrman, 97 U. S. 309, at 315; 24 L. Ed. 890, 892-93;

Wilmington Ry. Bridge Co. v. Franco Ottoman S. S. Co., (C. C. A. 4th) 259 Fed. 166, 168;

The Invertrossachs, (C. C. A. 3rd) 59 Fed. 194, 197;

Albert N. Hughes, (C. C. A. 3rd) 92 Fed. 525 at 528.

In addition to the presumption of fault in the Martinez, are the specific charges of fault in the Healy Company's verified and uncontradicted petition to modify the restraining order (44).

Consistent with the character in which they sued, i. e., as owners of the Falcon only, the Shell Companies offered a stipulation for $3,000, the value of the allegedly innocent Falcon, and none for the value of the presumptively guilty Martinez, also specifically charged with her own separate faults of navigation. The uncontradicted affidavit (36, Par. VIII) proved and the Shell brief below admitted

that the value of the Martinez was substantially in excess of the amount of the damages to the pier.

Despite the fact that the Healy suit constituted the only claim against the Martinez and that the Martinez' value exceeded the claim, and further that the Shell Companies did not offer to surrender the Martinez or her value, they sought an injunction restraining the Healy Company from suing in any forum of its own choice the Martinez or the appellees, as her owners, on charges of her faults. Such an injunction was ordered issued and was served on the 25th day of May, 1929. At that time no suit had in fact been filed in the State court.

A citation was served and published and, on the return day, no other claims being filed (47), default was entered against all persons other than the Healy Company (47). Thus both by the allegations of the Shell petition and the adjudication of the court below, this is a single claim proceeding.

The Healy Company filed a verified petition to modify the injunction so as to permit the prosecution of its suit, based on its right under the California Code of Civil Procedure, Sections 813 et seq., against the Martinez and its rights against her owners for her faults leading to the collision. Such a suit is *quasi in rem* against the vessel and *in personam* against the owners. The petition for modification disclosed that the lien on the Martinez, created by the state law, was not cognizable in admiralty and that the injunction, in effect, destroyed that lien. At the same time it deprieved the Healy Company of its right to a jury trial and to the remedies of the State court,

such as a verdict by nine jurors, etc., and of its right to a joint trial in a single suit of the responsible officers, crew and owners of the Martinez, and of the ferry and the owners of the ferry.

The petition for modification of the injunction was argued and briefed and submitted on May 23rd. On October 19, 1929, it was denied without opinion (51).

It also appears in the Apostles that the District Court, acting under the authority declared in

In re Oceanic Steam Navigation Co., (C. C. A. 2nd) 204 Fed. 260,

and the stipulation of proctors, modified the injunction to the extent of permitting the *filing* of a suit *quasi in rem* against the Martinez and her owners in the Superior Court of the City and County of San Francisco, State of California, and the taking of such depositions as are allowed by the State laws. This modification of the restraining order was made to enable the Healy Company to file its suit against the Martinez and her owners within the year from the time the cause of action accrued allowed by C. C. P. Sec. 813. It provided that neither of the Shell Companies should be required to plead to or answer any complaint or other pleading filed in the suit. The continuance of the restraining order destroys the enforcement of the $55,000 bond given in that suit and hence destroys the bond. The permission to take testimony in the State court is of no value because the trial at which they would be used is enjoined.

It is but fair to our opponents, although it does not appear in the record, to state that such a suit for $50,000

has been brought against the Martinez and her owners in the Superior Court of the City and County of San Francisco and that the lien of the Martinez has been perfected by seizure, and a bond in the sum of $55,000 filed with the California State court for the release of the Martinez. That suit relies not only on the fault of the Martinez, her master and crew, but is a suit against the master of the Martinez *in personam* for his faults, and the master of the tug Falcon for his faults, and against the Golden Gate ferry boat for her separate faults and against the owner of the Golden Gate ferry boat for alleged faults of the ferry.

The right of the Healy Company against the barge Martinez for her torts, created by the Code of Civil Procedure, Sec. 813, is based upon the following language in that code:

> "All steamers, vessels and *boats are liable* * * * (6) For injuries committed by them to persons or property in this state."

As in admiralty, the boat is the primary thing liable, for, if the owner is absent from the State, the jurisdiction to seize and sell her is obtained by serving the master of the vessel and attaching her. Such an attachment at common law for a claim in tort is unique. It has been called by the California Supreme Court a suit *"quasi in rem"* (*Olson v. Birch,* 133 Cal. 479, 483). Where, as here, the property injured by the boat is a land structure, admiralty has no jurisdiction of the suit. However, its essential identity with a suit *in rem* in admiralty is described by Chief Justice Holmes (now Mr. Justice Holmes) in *Tyler*

v. Judges of Court, etc., 55 N. E. (Mass.), 812, 814, (2nd col.).

The effect of the injunction as it now stands, is to prevent the litigation of the claim of the lien of $50,000 upon the Martinez and against the owners for her faults. So far as these claims are concerned the Healy Company is enjoined from bringing the suit to issue and hence to trial.

The Healy Company is now, in effect, restrained as if the injunction had been issued *after* the State suit had been filed.

The District Court is now ready to proceed to hear and determine in the separate limitation proceeding the issues, the trial of which it has enjoined in the forum chosen by the Healy Company, the Superior Court of the city and county of San Francisco.

I.

The two methods of obtaining limitation of liability: (a) by the owners' answer in the suit in the forum of the choice of the injured claimant: (b) in a separate limitation proceeding where, after the surrender of the value of the charged vessel, the forum chosen by the injured claimant is ousted of jurisdiction to proceed.

The owner of a vessel against whom claims are made because of her faults, has his choice of two methods of securing the limitation of liability created by the acts of Congress. The one method is simply to answer the complaint or libel of the persons claiming damage, in the forum chosen by that claimant, setting up the right to

limit. The other method is by instituting a separate and extraordinary proceeding for limitation of liability where, upon satisfying certain prerequisites created by the statutes and rules of court, the jurisdiction of the forum chosen by the damage claimant is ousted.

Our Supreme Court has long since decided that the ship owner claiming limitation may avail himself of either of these methods. If he accepts the forum chosen by the claimant, his surrender of the value of the vessel ultimately found to be in fault comes at the end of the litigation. It is not a prerequisite to the right to set up the defense. This was squarely held in

> *National Steam Navigation Co. v. Dyer,* 105 U. S. 24, at 34, 26 L. Ed. 1001, at 1004,

where the court said:

> "But it is objected that they did not follow the statute, by giving up and conveying to a trustee, the strippings of the wreck and the pending freight. It is sufficient to say, that the law does not require this. It contains two distinct and independent provisions on the subject. One is, that the ship owners shall be liable only to the value of the ship and freight; the other is, that they may be discharged altogether by surrendering the ship and freight. If they failed to avail themselves of the latter, they are still entitled to the benefit of the former kind of relief. The primary enactment, in section 4283, R. S., is, that the liability of the owner for any loss or damage without his privity or knowledge, shall, in no case, exceed the amount or value of his interest in the vessel and her freight, then pending. Two modes for carrying out this law are then prescribed, one in section 4284, and the other in section 4285. By section 4284, a pro rata

recovery against the ship owner is given to the various parties injured 'in proportion to their respective losses'; and it is added 'For that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable, among the parties entitled thereto.'

The other mode of attaining the benefit of the law is prescribed by section 4285, which declared, that 'it shall be deemed a sufficient compliance on the part of such owner, with the requirements of this title, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, etc., from and after which transfer all claims and proceedings against the owner shall cease.' This last proceeding the respondents did not see fit to adopt; but that does not deprive them of the benefit of the preceding section."

Nat. Steam Nav. Co. v. Dyer, 105 U. S. 24, at 34; 26 L. Ed. 1001, at 1004-1005.

As held in this case, where the ship owner seeks a limitation by answer, in the common law or other forum chosen by the claimant, there would have to be no surrender of the value of the vessel until after the trial had determined which of the various vessels involved was the offending instrument. In fact the word "surrender" though often used, does not properly describe what happens. There is merely a final decree of judgment *in personam* for the limited amount. There are involved none of the costs of the extraordinary separate limitation proceeding and none of the duplications of trial and procedure which is likely to arise in the event that the petition for separate limita-

tion be denied. This simple method of procedure has been repeatedly followed and the duty of the court has been recently described by the Supreme Court in the cases of

Liverpool, Brazil, etc. Navigation Co. v. Brooklyn, etc. Terminal, 251 U. S. 48; 64 L. Ed. 130, and *Sacramento Navigation Co. v. Salz,* 273 U. S. 326; 71 L. Ed. 663.

In such cases there is no attempt to oust the forum chosen by the damage claimant. The owner offers his plea for a limitation in the suit in the claimant's forum. In such cases it is decided *at the end of the litigation* which of the several ships involved was the "offending vessel" and her value alone is required to be surrendered after the issue of liability is determined.

However, this simple and inexpensive method of procuring limitation did not appeal to the Shell Companies. They feared the trial of their case before a jury in the State court in a procedure where nine jurors may render a verdict.

So, the Shell Companies determined to oust the forum chosen by the Healy Company and to bring the single Healy claim into admiralty, where the claimant would be deprived of its jury and state remedies through the exercise of the District Court's extraordinary power of injunction.

The congressional statutes allowing the limitation of liability, Revised Statutes 4283 to 4285 inclusive (now 46 U. S. C. A. sections 183 to 185), exact as a price or consideration for the granting of this extraordinary power

to oust the state or other courts of their jurisdiction, the surrender of the vessel charged with the offense.

This case more than any other illustrates the extraordinary character of the separate proceeding to limit liability. Admiralty has no jurisdiction whatsoever over the claims for injury to Pier 45, a land structure. The Healy Company could not bring its suit in admiralty against any one of the three vessels involved or against any of the persons owning or managing these vessels. The Healy Company is not only entitled to its common law forum, with its jury, but it could bring its suit in none other than a common law court.

The Panoil, 266 U. S. 433, 69 L. Ed. 366.

By virtue of the extraordinary jurisdiction created in the limitation proceedings such an exclusively common law claim may be brought into an admiralty court where the case is heard without a jury.

Richardson v. Harmon, 222 U. S. 96, 56 L. Ed. 110.

But the jurisdiction in this extraordinary proceeding is never to be presumed. The Federal courts jealously protect the common law courts. As was said by this Circuit Court of Appeals in a limitation proceeding,

> "The object of the acts of Congress for the limitation of liability applies only to cases where liability may be limited. Except for that particular purpose it clearly was not the intention of Congress *to oust the jurisdiction of other courts.* * * * It was for the petitioner to set forth facts showing the *peculiar and exclusive* jurisdiction of the court of admiralty. This it has failed to do."
>
> *Shipowners & Merchants Tugboat Co. v. Hammond Lumber Co.,* 218 Fed. 161, at 165.

In *The Aquitania,* (1927 C. C. A. 2nd) 20 Fed. 2nd 457, the court said:

> "The statute is intended to limit the liability of the shipowner, but not arbitrarily to give him a *particular forum.*" (p. 458, citing *The Tug No. 16,* ~~supra~~.)

In the succeeding chapters of this brief we will show that the Shell Companies have not paid this price of the surrender of the Martinez, charged in the State Court with fault. We will show that the whole proceeding, in which the United States District Court enjoined the prosecution of the suit in the Superior Court of the City and County of San Francisco, was without jurisdiction either for the injunction issued or to take any step toward limitation of or exoneration from liability for the fault of the Martinez.

II.

When a vessel or the owner thereof is sued or about to be sued because of a claim of fault against her, such owner can maintain a separate and original limitation and exoneration proceeding, only by the giving of a stipulation for the amount or value of his interest in such vessel or by the transfer of his interest in such vessel to a trustee.

It is only upon compliance with such prerequisites that the court will grant a restraining order restraining the further prosecution of suits against the owner in respect to any such claim.

The record in this case shows that the large power steered barge Martinez collided with Pier 45 and, as a result of the collision, damages amounting to $50,000 are claimed against her and her owners. The collision is specifically charged as caused by the negligent steering

of the Martinez by her own officers and crew. Apart from this there is a presumption, disputable to be sure, that she was in fault for the collision.

The existence of this *claim* against the Martinez and her owners is the basic factor in this litigation. It is true that a State court suit has been begun upon the claim in which an undertaking for $55,000 has been given and the owners have been made defendants. The suit, however, is merely making certain the existence of the claim.

The right of the owners to limit liability for this claim rests upon Sections 4283 to 4285 of the Revised Statutes. These statutes have been construed by the Supreme Court in what is now Admiralty Rule 51. The title of this chapter of our brief contains the exact phraseology which the Supreme Court uses in that rule in construing the limitation statutes. The pertinent portions of that rule are as follows:

> "U. S. Sup. Ct. Ad. Rule 51.
>
> LIMITATION OF LIABILITY—HOW CLAIMED.
>
> When any ship or vessel *shall be libeled*, or the owner or owners *thereof* shall be sued * * * for any loss, damage or injury by collision * * * and he or they desire to claim the benefit of limitation of liability provided for * * * in Sections 4283 to 4285 of the Revised Statutes, * * * the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which said limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of *said owner* or owners, respectively, in *such ship or vessel*, and her

> freight, for the voyage, shall make an order for * * * the giving of a stipulation with sufficient sureties or an approved corporate surety for the payment *thereof* into court with interest at the rate of six per cent per annum from the date of said stipulation and costs, whenever the same shall be ordered; or, if the *said* owner or owners shall so elect, the said court shall, without such appraisement make an order for the transfer by him or them of *his or their interest* in *such* vessel and freight to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall * * * on the application of the said owner or owners, make an order to restrain the *further* prosecution of all and any suit or suits against *said* owner or owners in respect to any *such* claim or claims."

The phrases in the rule are subject to but one interpretation. The remedy of a separate and original limitation proceeding is created to enjoin suits in other forums, commenced against a ship or vessel or the "owner or owners *thereof*" for any injury by collision. In order to obtain this benefit of the statute there must be an appraisement of the interest of the "*said* owner or owners respectively in *such* ship or vessel," that is, the vessel *then charged* with fault, not some other vessel, whether alleged innocent or guilty by the petitioner for limitation. The owners must give a stipulation for the appraised amount of the vessel so sued or of which the owners "thereof" are sued. Or, if the owners do not care to give a stipulation, they shall transfer "their interest in *such* vessel" to a trustee.

After one or the other of these two jurisdictional prerequisites have been satisfied, the court shall make an order to restrain the "further" prosecution of any and all

suits against them "in respect of any *such* claim or claims."

It is thus clear that the restraining order *precedes* any adjudication of the claim or claims against the vessel or the owners "thereof." Since the surrender of "such vessel" or her value precedes the injunction, it is apparent that it is the unlitigated and unliquidated claim against "such vessel" which determines the vessel to be surrendered or stipulated for as the *res* in the limitation proceedings.

The same jurisdictional prerequisite is required if exoneration in addition to limitation is sought by the ship owner. Supreme Court Admiralty, Rule 53, provides that the same surrender is required before proceeding to hear and determine a claim for exoneration, as in Rule 51 for limitation.

> "53. Defense to Claims in Limited Liability Procedure.
>
> "In the proceedings aforesaid, the *said* owner or owners shall be at liberty to contest *his* or their *liability,* or the liability of *said ship* or vessel for *said* embezzlement, loss, destruction, *damage* or *injury,* (independently of the limitation of liability claimed under said act), provided he, it or they shall have compiled with the requirements of Rule fifty-one." * * *

In this case the court, without the giving of a stipulation for the value of the Martinez and without her transfer to a trustee, has issued its restraining order restraining the further prosecution of the claims arising from the faults charged against her and her owners.

We submit, that on the face of Rules 51 and 53 themselves, the Supreme Court has so construed the act limiting liability that it discloses that the injunction issued was without the jurisdiction of the District Court.

Even without the interpretation of the statute given by the Supreme Court in its Admiralty Rule 51, the statute itself clearly shows that the vessel to be surrendered is the vessel against which the claim is made, not the vessel against which the claim is thereafter proved.

46 U. S. C. A., Sec. 185, provides that the owner complies with the provisions for obtaining jurisdiction for a separate limitation proceeding which ousts the forum chosen by the claimant.

> "* * * if he shall transfer his interest *in such vessel and freight,* for the benefit of such claimants to a trustee to be appointed by any court of competent jurisdiction, to act as such trustee for the person who *may* prove to be legally entitled thereto; from and after which all claims and proceedings against the owner shall cease." (R. S. 4285.)

The statute shows that the claims themselves determine what vessel is to be transferred to the trustee. The trustee holds the vessel "for the person who *may* prove to be legally entitled thereto." That is the claims *may* be proved *in the future,* the trustee holding the vessel until the unproved claim is established. It is the *claim, not the proof,* which determines the *res* to be surrendered. "Such vessel" can only mean the vessel or vessels or the owner thereof against which "claims or proceedings" are urged.

That it is the character of the claims *at the time of filing the petition* and not the subsequent defense to the claims,

which determines the jurisdictional prerequisites for a separate limitation proceeding, has been squarely held by this court in the case of

> *Anderson v. Alaska S. S. Co.,* (C. C. A. 9th) 22 Fed. 2nd. 532, at 534.

In that case the question was, did the claims at the time of filing the petition exceed the value of the vessel belonging to the petitioning owner. If they did not then exceed the amount surrendered to the court there was nothing to limit. The jurisdiction is dependent on the surrender of the vessel involved creating a *res* less than the amount of the claims.

The amount surrendered in that case was upwards of $79,000. When the claims were filed they aggregated only $45,000. There were, however, other claims of over one hundred other persons entitled to the same relief as those filing claims. It was urged against the jurisdiction that the petitioner would have a good defense to these other claims and, when so established, the total amount would be less than the value of the vessel surrendered. Judge Rudkin's opinion goes on to say that whether the defense to these other claims prove to be sound or unsound,

> "the petitioner could not be denied the benefit of the statute, simply because *it might have a defense* of doubtful validity to some of the claims".
>
> *Id.* p. 534.

So, in the case at bar, the Shell Companies should not be granted, in this separate limitation proceeding, an injunction to restrain the State court suit against the Martinez, without the surrender of the Martinez, because the

petitioner "might have" a defense to the claim of $50,000 against her based on the charges of her tort.

The startling thing is that, although the argument was fully briefed below, not a single case was cited in which such an injunction was sustained against a State or other court suit pending or threatened, charging specific fault against the specific vessel concerning which fault the owner was sued or about to be sued.

The reason why no such case was cited is because Rules 51 and 53 construing the limitation act, are so clear in their interpretation that, until the instant litigation, no proctor has had the temerity to press for a contrary construction.

The whole theory of the separate limitation proceeding is based upon jurisdiction acquired of a certain *res,* i. e., the vessel *charged* with wrong doing. As was said by Mr. Chief Justice Taft, speaking of limitation proceedings,

> "The jurisdiction of the admiralty court *attaches in rem* and in personam by reason of the custody of the *res* put by the petitioner into its hands."
>
> *Hartford Accident Co. v. S. P. Co.,* 273 U. S. 207, at 217; 71 L. Ed. 612 at 616.

What this *res* is the Supreme Court has defined in Rule 51, supra. It is the transfer of the vessel *charged with the fault* or the giving of a stipulation for her value.

It is so obvious that it seems like over-stressing the elemental, to say that the jurisdiction must have "attached" before the question of exoneration from or limitation of liability is to be litigated in a separate limitation proceeding. It is clear from Judge Taft's language that

no jurisdiction attaches before the petitioner has put the custody of the *res* into the court's hands. It is only after jurisdiction attaches in this way that the court can proceed to determine the dispute, which in this case is whether the claimants against the vessel and her owners are right in their assertion of the faults of the Martinez, or the owners are right in their denial of the faults and their assertion of her innocence.

In our next chapter we will attempt to analyze the argument made in support of the injunction and to discuss its fallacy.

III.

The mere denial of faults charged against a vessel and her owners does not confer jurisdiction in a separate limitation proceeding or for an injunction restraining a suit based upon such charges of fault and brought in the forum of the claimant's choice.

The petition for limitation denies that the barge Martinez was in fault and also denies that the little tug Falcon, towing her, was in fault. It alleges that a third vessel, a ferryboat, obstructed the course of the Falcon and the Martinez and that because of this obstruction the tug was compelled to stop towing and the Martinez by some method, either her momentum, the wind, or the tide, collided with Pier 45 and occasioned the damage.

As we have pointed out, in addition to our charges of specific negligence in navigating the barge, as distinguished from the tug, there is a rebuttable presumption

that the barge, the moving object which struck the fixed pier, is in fault.

See the *Virginia Ehrman* and other cases cited supra.

On the other hand, there is no such presumption against the tug Falcon. The tug is presumptively innocent as well as alleged by her owners to be innocent, but the tug was of very small value as compared to the presumptively guilty Martinez. The respective values are $3,000 for the Falcon and upwards of $55,000 for the Martinez. In the State court suit they bonded her for $55,000, and, as we have pointed out, the value of the Martinez was so great that it exceeded the total sum claimed for the damages to Pier 45.

Now comes the strange illogic of the procedure of the Shell Companies. They gave a stipulation for $3,000, the value of the allegedly innocent tug, and asked for and obtained an order restraining suits based on charges of fault in the presumptively guilty Martinez.

It is reasonable to suppose that the purpose of this subterfuge was to be able to say to the court below, "Well anyhow you have some sort of a ship in your jurisdiction and, although we tell you she is innocent, you have some sort of a *res* and hence you should enjoin actions against an entirely different vessel, presumptively guilty".

At the argument below it was stated, substantially, "We have denied the guilt of the Martinez of which there is this presumption, but we have given the value of another vessel innocent, to be sure. Now the business of the court is to go ahead and entertain the litigation and, if

we are wrong, the injunction against the State court suit may be dissolved and the litigation be repeated in the State court, where the Healy Company can *again* establish what it has established *here,* namely, that we were mistaken and the vessel presumptively at fault finally proved to be at fault".

But, surely, this is lifting oneself by one's own bootstraps. The right to proceed in the separate limitation litigation at all, arises only upon the surrender of this presumptively guilty vessel. As a matter of fact it arises only upon the surrender of the vessel charged with fault, whether or not there be any presumption regarding her guilt. It is the *claim* of fault, not the proof of fault, that requires the surrender of the charged vessel. No jurisdiction *"attaches"*, to use the language of Judge Taft, until the *res* is given to the court and only *thereafter* can the questions of which vessel was at fault be litigated in a separate limitation proceeding.

When pressed in argument below, the Shell proctors admitted that their case was a desperate one. What made them desperate was the fact that they would have to face a jury in the State court unless they could hide behind the value of the little Falcon and keep the trial against the valuable Martinez out of the State's jurisdiction. If they surrendered the Martinez or gave a stipulation for her value in the limitation proceeding, they would instantly disclose that the value of the *res* exceeded the value of the single claim and the other prerequisite for a separate limitation proceeding, namely, that the

claim should be for more than the *res,* would not be satisfied.

Shipowners and Merchants T. Co. v. Hammond L. Co., (C. C. A. 9) 218 Fed. 161.

The following, we believe, is a fair statement of the absurd results which would follow if the court were to adopt this subterfuge whereby the Falcon's $3,000 value is the basis for enjoining suits against the $55,000 Martinez.

Suppose the steamer Virginian, valued at $10,000,000, is emerging from her dock in the harbor of New York and rams and sinks the steamer Bremen, worth, say, $8,000,000. The Bremen is a fixed object, moored at her pier. The owners of the Bremen libel the Virginian for $8,000,000 and Panama Pacific Steamship Co., the Virginian's owners, give a bond for $8,000,000 and she is released.

The Panama Pacific line then files a limitation proceeding in which they allege that the Virginian was innocent of fault and that the collision was occasioned in this way,—there was a rowboat, not belonging to the Virginian, but to the Panama Pacific line, containing the superintendent of the Virginian's owners, which came suddenly from behind another vessel, across the path of the Virginian. The Virginian's captain, suddenly recognizing the superintendent of the line, *in extremis,* puts over his helm to avoid the rowboat and thereby innocently ran into and sank the Bremen. This is of course denied by the owners of the Bremen.

The Panama Pacific Co. thereupon tenders the value of their rowboat, say $300, and the court accepts jurisdiction

of the limitation proceeding on the receipt of the *res* of a $300 stipulation, and enjoins the $8,000,000 suit against the Virginian. That is to say the $300 bond is sufficient to destroy the $8,000,000 lien on the mere *allegation* of innocence.

Such a happening, though improbable, is not at all impossible. If the allegations are ultimately proved and the captain of the Virginian truly acted *in extremis,* the Virginian is innocent of wrong doing and would be held to be innocent by the court deciding the case on the facts as stated.

Could anyone believe that so absurd a proposition would be offered in a limitation proceeding as that the tender of the $300, the value of the rowboat, would warrant an injunction against the $8,000,000 libel against the Virginian and an ousting of the libel proceeding by the limitation proceeding, simply because of an *allegation* of the above facts in the petition for limitation?

We reiterate that it is the claim against the specific vessel at the time it is made, which determines the *res* which must be placed in the hands of the court. It is not the ultimate proof of the innocence or guilt of the charged vessel which determines the right to enjoin proceedings in other tribunals.

As we have said before, no case has been found, in which it has been held that the surrender of one vessel as a *res* in a limitation proceeding has warranted an injunction against a suit arising from the faults charged against another vessel. The litigant is entitled to the forum of his choice, whether it be in the State court or in admiralty,

until the vessel charged with the fault or its value is given as a *res* to invoke jurisdiction for a separate limitation proceeding.

This is not to say that there are no cases cited in the court below. There were many. They may be grouped in three classes:

(a) Cases where the right to a limitation was set up in the answer. Here were involved no injunctions ousting or restraining the exercise of jurisdiction of the courts chosen by the claimants. In this group were the cases of *Van Eyken v. Erie Ry.,* 117 Fed. 712; *Liverpool etc. Nav. Co. v. Brooklyn Terminal,* 251 U. S. 48; 64 L. Ed. 130; and *Sacramento Navigation Co. v. Salz,* 273 U. S. 326; 71 L. Ed. 663. The courts there held that when the defense is set up in the answer, as allowed first in *National Steam Navigation Co. v. Dyer,* supra, the responsibility of the vessel or of the one of several vessels shall be first determined and the value of only the "offending vessel", so determined, should be expressed and given in satisfaction of the claim or claims.

(b) Limitation proceedings brought after the responsibility was fixed in the State courts in common law cases. In such cases judgments had been entered in the State courts and one or another of the several charged vessels had been found to have committed the offense. Thereafter a separate limitation proceeding was brought and injunction asked against the enforcement of the several judgments. It was held that the question as to which was the offending vessel, having been litigated in the tribunals chosen by the claimants, the decisions in that

litigation were binding in the limitation proceeding, and the value of the vessel so adjudged to be guilty constituted the amount to be surrendered. In this group was the case of *The Begona* II, 259 Fed. 919.

(c) Limitation proceedings enjoining State court suits upon the surrender of the value of certain vessels, it not appearing in the opinions that the other vessels which it was claimed should be surrendered had been charged with any specific faults or wrong doing in the State court or other jurisdiction chosen by the claimant. Such were the cases of *The Erie Lighter 108,* 250 Fed. (D. C.) 493 and 494; *O'Brien Bros.,* (D. C.) 252 Fed. 185.

In these two District Court cases there is nothing to indicate that in the suits filed in the State court, the tort claimed was a tort of the vessel which was not surrendered in the limitation proceeding. They are clearly distinguishable from the case at bar, *and present no discussion of the text of Rule 51 of the Supreme Court, or of Section 4285 of the Revised Statutes.* It does not appear in those cases, to use the language of Rule 51, that the ship sought to be surrendered was the ship which "shall be libeled", or of which the owner "shall be sued" for any "damage or injury by collision", or otherwise. Under no straining of construction can it be said that the court, in those cases, said: "It is true that the suits in the State court assert a tort committed by the vessel which is not surrendered. Nevertheless, although charged with such fault, we will enjoin the suit in the State court without the surrender of that vessel in this limitation proceeding, because there are defensive allegations in the petition

to the allegations of the suit in the State court." However if these two District Court cases were not clearly distinguishable from the case at bar, and could be cited as an authority to the effect that where there is a suit based upon a right *in rem* or *quasi in rem* against a vessel, it can be enjoined without surrender of that vessel, because the owner, in his petition in a separate limitation proceeding, merely alleges a defense to the right *in rem,* they are clearly against the decision of the Circuit Court of Appeals of this Circuit, in

> *Anderson v. Alaska Steamship Company,* (C. C. A. 9th), 22 Fed. (2nd) 532, at 534, cited supra.

In that latter case, it was determined that it is the existence of the claims at the time of filing the petition, and not the defense to the claims, which determines the jurisdiction.

Other cases cited were claimed to show there was no presumption against the trailing barge which we alleged was navigated into Pier 45 and that there was a presumption of fault in the tug. These authorities are cases where the barge was lashed hard alongside the tug and had and could have no participancy in the circumstances leading to the collision.

Such a case is *The Transfer No. 21,* (C. C. A. 2nd) 248 Fed. 459. In that case, it appeared that because the tow, a car float, was without motive power, lashed alongside the tug, and moved by it, that it *could not be* at fault. This was the holding of that court, in the following language:

> "A tow without motive power alongside a tug and moved by it *cannot be* at fault."

Obviously, the *ratio decidendi* of this case is that, if the car float *could* have been at fault and the charge *in rem* were made against her, the prosecution of that charge in the State court would be enjoined only on the surrender of the car float in the limitation proceeding. So, also, in

> *Liverpool, Brazil & River Plate Steam Navigation Company v. Brooklyn Eastern District Terminal,* 251 U. S. 48, 64 Law. Ed. 130.

There, the court considered only the question whether or not innocent vessels must be surrendered because lashed alongside the guilty tug. In the summary of the argument in that case, reported in the Law. Edition, the only question presented by the injured party, the petitioner on *certiorari,* was whether *all* of the vessels in the common venture should be surrendered, *regardless of fault.* The Supreme Court assumes, as did the Circuit Court of Appeals in *Transfer No. 21,* that

> "the moving cause was the respondent's steam tug Intrepid, which was proceeding up the East River, with a car float loaded with railroad cars *lashed to its port side* and on its starboard side a disabled tug, both belonging to the respondent. * * * The car float was the vessel that came into contact with the Vauban, but as it was a passive instrument in the hands of the Intrepid, that fact does not affect the question of responsibility."
>
> (251 U. S. at 51-52, 64 L. Ed. 130, at 131.)

Mr. Justice Holmes cites with approval, the decisions of other courts holding that the barge lashed alongside *cannot* be responsible, and amongst them the *Transfer No. 21,* cited supra.

Equally significant, Mr. Justice Holmes supports the distinction between a barge lashed alongside and a barge trailing on a hawser steering her course behind the tug, by citing his own prior opinion holding such a trailing barge liable *in rem* for faults committed by her. This was the case of the

Eugene F. Moran, 212 U. S. 468, 474, 475; 53 L. Ed. 600, 603, 604.

The specific faults of the trailing tows in the *Eugene F. Moran* case are set forth in the opinions below:

D. C. 143 Fed. 187; C. C. A. 154 Fed. 41.

There is nothing in the *Liverpool* case which, in the remotest way, indicates that if the car float had been *trailing behind* the tug, and there was a suit *quasi in rem* for negligent steering, supported by a presumption of fault, pending against her in the State court, the Federal court, in a separate limitation proceeding, would have enjoined such suit, without the surrender of the car float, or her value.

That question could not arise in the *Liverpool* case, because, as we have pointed out, that was not a separate limitation proceeding and it was not sought to oust the State court of its jurisdiction. The defense was made in the answer and the question of the vessel to be surrendered arose only after the question "Which was the offending vessel?" had been decided. There was hence no discussion of Admiralty Rule 51 of the Supreme Court and certainly nothing said which impairs the validity of that rule as stating the jurisdictional prerequisites for a separate limitation proceeding.

It is therefore submitted that the mere defensive allegation of want of fault in the presumptively guilty barge Martinez, without the surrender of that vessel or giving a stipulation for her value, does not confer jurisdiction in a separate limitation proceeding, to enjoin a suit in a common law court based on charges of fault against her and brought in the forum of the injured party's choice.

Precedence of the appeal in this Circuit Court of Appeals and Petition to Advance Hearing.

Section 129 of the Judicial Code provides that an appeal to the Circuit Court of Appeals from an order denying an application to dissolve or modify an injunction "shall take precedence in the appellate court." Apart from the statutory right of precedence in this court, the appeal in this case presents cogent reasons for its expeditious hearing and decision. While such an order as that refusing the modification of the injunction is called interlocutory, in this case the decision is final in character.

The sole question presented is the jurisdiction of the District Court to hear and determine *anything* with respect to the charges of fault against the Martinez and her owners. The facts on which the appeal is based are none of them controverted. The appeal presents a pure question of law, namely, can the District Court proceed to do anything with regard to the State court suit until a stipulation in the value of the accused and presumptively guilty Martinez is filed with the court, or the Martinez herself is surrendered to a trustee.

If our contention be correct and her value must be surrendered, it at once appears that there is no jurisdiction for a *limitation* proceeding. The value of the vessel exceeds the single claim and there is nothing to limit.

Shipowners and Merchants T. B. Co. v. Hammond Lumber Co., (C. C. A. 9) 218 Fed. 161.

It is obvious that it is to the great convenience of this court, and the District Court, and the litigants herein, to

decide this underlying question of jurisdiction at this stage of the proceedings. Under the order as it now stands, the limitation proceeding would go forward and come to trial, and all of the evidence be taken on all of the issues presented by the petition at great consumption of the time of a busy court and great expenditure of time and money on the part of the litigants.

The appeal from the limitation trial in the District Court would require the printing of the entire record, including all the evidence, for the Apostles here and at substantial expense.

If the contention made by the appellant be correct, all this would be a waste of time of the court and litigants and of the money expended.

Not only would the time, energy and expense of the District Court proceedings and the appeal here be wasted, but in the two or three years in which the case would be there and here litigated, and certiorari or appeal be sought and disposed of, the witnesses in the State court proceeding may disappear; or if their depositions had to be taken, the litigants would lose their right of having their witnesses appear before the jury. In such time the memory of witnesses grows dim and each month increases the vexation to client and counsel of reconstructing the circumstances of ancient happenings.

Since this is a single claim case, there are no other litigants to be embarrassed while the instant controversy is being determined.

It is, therefore, submitted that both as a matter of statutory right and as a matter of convenience to this

court, the District Court and all the parties, this appeal should be accorded precedence and an early hearing and prays that it be heard at an early date, say December 16, 1929.

CONCLUSION.

Wherefore, appellant submits that the restraining order issued by the District Court, restraining the Healy Tibbitts Construction Company from prosecuting its suit in the Superior Court of the City and County of San Francisco, State of California, against the barge Martinez and the owner thereof for faults of the said barge, was issued without the jurisdiction of the said District Court; and that the said injunction, in so far as it restrains the prosecution of the said suit by the Healy Tibbitts Construction Company for the faults of the Martinez, should be vacated and quashed, and the said Healy Tibbitts Construction Company be permitted to pursue the said litigation without the interference of the said court acting in the said limitation proceeding, and to that end the order appealed from should be reversed.

William Denman,
Edwin T. Cooper,
Proctors for Healy Tibbitts Construction Company, Appellant, appearing specially below to move against the restraining order issued by the said District Court.

No. 5980

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTHWESTERN STEVEDORING COMPANY, a Corporation, and OCCIDENTAL INDEMNITY COMPANY, a Corporation,

Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District Under the LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, and MARTIN MATHESON,

Appellees.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

FILED
NOV 15 1929
PAUL P. O'BRIEN,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS.

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GATES, CASSIUS E., Central Bldg., Seattle, Washington,

DOBRIN, E. G., Central Bldg., Seattle, Washington,

Attorneys for Appellants.

LLOYD, WESLEY, Perkins Bldg., Tacoma, Washington,

SAVAGE, ANTHONY, United States District Attorney, Seattle, Washington,

McCUTCHEON, JOHN T., Assistant United States District Attorney, Tacoma, Washington,

Attorneys for Appellees. [1*]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 393.

NORTHWESTERN STEVEDORING COMPANY, a Corporation, and OCCIDENTAL INDEMNITY COMPANY, a Corporation,

Complainants,

vs.

WM. A. MARSHALL, Deputy Commissioner Fourteenth Compensation District Under

*Page-number appearing at the foot of page of original certified Transcript of Record.

the LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, and MARTIN MATHESON,

Defendants.

BILL OF COMPLAINT.

Come now the complainants and for their bill of complaint against the defendants allege:

I.

That the complainant, Northwestern Stevedoring Company, is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Washington, and an employer within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

II.

That the complainant, Occidental Indemnity Company, is now and at all times herein mentioned was an insurance company organized as a corporation under and by virtue of the laws of the State of California, and carrier secured by the complainant Northwestern Stevedoring Company, a corporation, in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act. [2]

III.

That Wm. A. Marshall is now and at all times herein mentioned was the Deputy Commissioner of the Fourteenth Compensation District under the

provisions of the Longshoremen's and Harbor Workers' Compensation Act.

IV.

That the defendant, Martin Matheson, was at the time of receiving the personal injury hereinafter referred to an employee of the complainant, Northwestern Stevedoring Company, a corporation, within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

V.

That on the 18th day of October, 1928, while on board the steamship "Point Reyes" in the harbor of the city of Tacoma, in the State of Washington, the defendant, Martin Matheson, sustained personal injury, and thereafter a hearing thereon was had pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, before the defendant, Wm. A. Marshall, as said Deputy Commissioner on the 29th day of May, 1929, a transcript thereof being attached hereto, marked Exhibit "A" and made a part hereof, and a subsequent hearing had thereon on the 4th day of June, 1929, a transcript thereof being attached hereto, marked Exhibit "B" and made a part hereof, resulting in a compensation order and award of compensation being filed by the defendant, Wm. A. Marshall as said Deputy Commissioner in his office on June 6, 1929, a copy of which is hereto attached, marked Exhibit "C" and made a part hereof.

VI.

That said compensation order and award of compensation is not in accordance with law and the provisions of the Longshoremen's and Harbor Workers' Compensation Act. [3]

WHEREFORE, complainants pray that said compensation order and award of compensation be suspended and set aside, and the payments of the amounts required by said award stayed, pending final decision herein, and for such other, further or different relief as to the Court may seem equitable and just, together with costs of suit.

BOGLE, BOGLE & GATES,
Solicitors for Complainant.

United States of America,
State of Washington,
County of King,—ss.

Frank G. Taylor, being first duly sworn, on oath deposes and says: That he is the Washington Agent of Occidental Indemnity Company, a corporation, one of the complainants herein. That he has read the bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are stated therein to be alleged on information and belief, and as to those matters he believes it to be true.

FRANK G. TAYLOR.

Subscribed and sworn to before me this 2d day of July, 1929.

[Seal] STANLEY B. LONG,
Notary Public in and for the State of Washington,
Residing at Seattle.

STANLEY B. LONG,
Notary Public, State of Washington.
Commission expires Aug 12, 1932. [4]

EXHIBIT "A."

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION.

Before WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District.

CASE No. 31–38.

MARTIN MATHESON,
Claimant,

vs.

NORTHWESTERN STEVEDORING CO.,
Employer,

OCCIDENTAL INDEMNITY CO.,
Insurance Carrier.

Pursuant to notice, this matter was heard before Wm. A. Marshall, Deputy Commissioner, United States Employees' Compensation Commission, at Tacoma, Washington, on the 29th day of May, 1929.

APPEARANCES:

The Claimant Appearing in Person.

MATTHEW STAFFORD, Esq., for the Employer and Insurance Carrier. [5]

The DEPUTY COMMISSIONER.—It is agreed by the parties that the claimant sustained an injury on October 18, 1928, as set forth in the application;

That both the employer and employee were subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act at the time of the injury;

That the relationship of employer and employee existed at the time of the injury;

That at the time of the injury the claimant was performing services growing out of and incidental to his employment;

That the average annual earnings of the claimant at the time of the injury amounted to the sum of $1829.54;

That the employer has paid $563.04 to the claimant as compensation.

This leaves in issue the questions of temporary and permanent disability.

Mr. Matheson, please stand up and be sworn.

MARTIN MATHESON, the claimant, called as a witness in his own behalf, and after having been first duly sworn by the Deputy Commissioner, was examined and testified as follows:

Direct Examination.

(By the DEPUTY COMMISSIONER.)

Q. Has there been considerable improvement, Mr. Matheson, in your condition from the time of the injury up to April 8th?

A. No. There ain't much of an improvement.

Q. Was there much change in your condition before April 8th—in the month before April 8th—much change?

A. There is not much improvement yet.

Q. There has not been much change yet? [6]

A. No. I will walk around for three or four hours and then I have got to lay off for the rest of it.

Q. For the rest of the day?

A. Yes, sir. And it is the same yet. I can walk for three or four hours and then I have tried to work the next day at home and I have been laid up the next day.

Q. What work were you trying to do?

A. Garden work.

Q. In what way did it bother you?

A. As soon as I twist my leg around or move around with it, I cannot do nothing after that.

It hurts me. Going downstairs or down a hill it hurts.

Q. How far are you able to walk?

A. Oh, I can walk three or four blocks, and if I have got a cane I can walk a quarter of a mile.

Q. Is that about the limit?

A. That is the limit that I can stand on my leg.

Q. What happens then?

A. Well, I cannot do no more.

Q. Why?

A. Because the leg is too sore. It swells up. The knee is swollen up. I cannot walk around now without having a bandage on it.

Q. Stand up, Martin, please so that we can see it. Is the leg swollen now?

A. No, it ain't swollen now—not much. A little bit. You can feel it.

Q. What sort of a bandage have you got on it?

A. An elastic bandage.

Q. Furnished by the doctor? [7]

A. Yes, sir, by Dr. Heaton.

The DEPUTY COMMISSIONER.—You may take him, Mr. Stafford.

Cross-examination.

(By Mr. STAFFORD.)

Q. Martin, how long between the time you were hurt—how long was it after you were hurt that you first started to walk around? How long were you laid up altogether?

A. I was laid up for a week and then I went to

work again. I was laid up for a week and then I went to work on Friday of the next week, and then I worked three or four days, I think—I don't remember just exactly. Somewheres in there, but I told the doctor about my—

Q. (Interrupting.) I understand that, Martin, but I mean from the time that you laid off work, how long was it before you started to walk again?

A. A week.

Q. And then you went back to work and you were laid up again later? A. Yes, sir.

Q. And how long after that was it that you walked around?

A. I walked around until they put a cast on me and then I was on crutches.

Q. How long were you in the cast?

A. Well, I don't know. About three or four weeks.

Dr. HEATON.—Just about a month that he was in a cast.

Q. Then after the cast was taken off did you start to walk on your leg right away? A. No.

Q. How long after that did you start to walk on it? [8] A. That I cannot tell you.

Q. Can you give us any idea?

A. No, I cannot, because I was laid up at home all the time with my leg up on a chair.

Q. You were laid up at home with your leg on a chair? A. Yes, sir.

Q. Did you have your leg up on a chair for a period of months?

A. Pretty nearly two months.

Q. Without stepping on it at all?

A. Oh, I just stepped on it, yes.

Q. Just a little bit? A. Yes, sir.

Q. But you did not walk any blocks or anything like that, did you? A. No, sir.

Q. When you did walk you walked on crutches, did you not, Martin? A. Yes, sir.

Q. How long has it been since you have been walking around on it?

A. I cannot say how long.

Q. Not long? A. I cannot say how long.

Q. Were you walking around at Christmas-time?

A. Christmas-time?

Q. Yes.

A. No. Christmas-time I was home and I didn't walk at all. I didn't walk or work.

Mr. STAFFORD.—That is all.

The DEPUTY COMMISSIONER.—That is all. [9]

(Witness excused.)

Dr. R. C. SCHAEFFER, called as a witness on behalf of the employer and insurance carrier, and after having been first duly sworn by the Deputy Commissioner, was examined and testified as follows:

Direct Examination.

(By Mr. STAFFORD.)

Q. What is your name, Doctor?

A. R. C. Schaeffer.

Q. And you are a practicing physician in the State of Washington, Doctor? A. Yes, sir.

Q. Where did you prepare for practice?

A. At the University of Michigan.

Q. When? A. 1908.

Q. You graduated in 1908? A. Yes, sir.

Q. And you are duly licensed and admitted to practice in this state? A. Yes, sir.

Q. How long have you been practicing here?

A. Twenty years.

Q. And you have examined Mr. Matheson?

A. Yes, sir.

Q. Just state with particular reference to the—I believe the right knee—what your findings were?

A. I examined him on December 6, 1928. His injury was on October 18th. That was about six weeks after the injury. He is a man sixty years old. Teeth very bad. Pyorrhea and infection of mouth. He walks normally and without a limp, although [10] he is somewhat knock-kneed on the right side. The right knee shows no swelling and no external evidence of injury. He complains of marked tenderness at the attachment of the external lateral ligament into the head of the tibia. He states that all his pain is at this point. Pressure at this point causes pain.

An X-ray examination shows a lessening of the articular space in the outer portion of the right knee-joint. There is some change in the external semilunar cartilage. A stereoscopic X-ray of this knee made by Dr. R. D. MacRae, roetenologist shows a beginning calcification of the external semilunar

cartilage. There is a spur on the outer aspect of the head of the right fibula. There is exostotic growth at the attachment of the patellar ligament to the tibial tubercle. In other words, that was evidence of a chronic articular rheumatism. An X-ray of the left knee does not show the same bony changes.

Q. Now, this calcification of the external semilunar cartilage, is that the result of an injury or is there merely evidence of the progressiveness of an arthritis?

A. An injury may precipitate arthritis in a joint, but in this particular case our X-rays were taken about six weeks after the accident and very advanced bony changes were found.

Q. Could these changes have taken place within the six weeks from the time that the injury had been received.

A. They could not have taken place in anywhere near six weeks at all.

Q. As a result of what injury he suffered?

A. No. These were calcified changes. They were bony formations and some of those bony formations—one of those is right at the insertion of the patellar tendon—at a place where there was no soreness whatever. [11]

Q. What evidence of injury did you find, Doctor?

A. The symptoms are purely subjective.

Q. Was there anything demonstrable that would indicate injury?

A. Tenderness to pressure at the points indicated.

Q. Was the arthritic condition sufficiently advanced to indicate a prognosis of permanent disability? A. Yes, sir. He has a bad knee.

Q. Well, of course, at that time his condition, at least as far as the injury was concerned, had not become fixed. Would it be possible, from your examination of him at that time, to estimate the permanent partial disability, even roughly?

A. You mean of the knee as it is?

Q. Yes. You—from your examination of him on December 6th. Could you even roughly estimate—

A. (Interrupting.) Well, offhand, I should say that the disability of that knee at the time that I examined it was probably about ten per cent. That includes arthritis and everything else.

Q. Whether or not that would be the same now, could you state?

A. No, I cannot state that for I have not examined him since.

Q. But the disability, regardless of what the extent of it was, I understand you to say, was unquestionably attributable to this arthritis which was indicated by the bony changes? A. Yes, sir.

Mr. STAFFORD.—That is all.

Cross-examination.

(By the DEPUTY COMMISSIONER.)

Q. Now, on what basis, Doctor, or on what facts could you [12] base your prognosis that he would

have had a disabled knee if the accident had not occurred?

A. Just on the X-ray findings. He has bony outgrowths on that knee that indicate a past trouble and a previous foot trouble. You see, he has such an extensive calcification of the external semilunar cartilage that it has made him knock-kneed. It has thrown his knee in and his foot out. He is going to get a flat foot eventually.

Q. With that condition of knock-knee—did that condition exist at the time of the injury?

A. It probably did, yes. That is the thinning that comes on slowly and the thinning of this cartilage let down this part of the joint and spread this one (indicating), you see.

Q. With that condition was that knee particularly susceptible to being aggravated by injury?

A. Oh, you bet.

Q. Doctor, on the basis of your examination what is your opinion as to there being any injury to the external lateral ligament of the knee and to its attached external cartilage?

A. Well, I think probably there may have been some injury there at that time, to both the internal and the external.

Q. And would not that condition probably aggravate the arthritic condition? A. Yes, sir.

Q. Do the conditions indicate in your judgment that it might be necessary to reset the cartilage?

A. If that was the only change in the knee, I would say remove the cartilage, but he has so many

extensive bond changes that I hesitate to advise any surgery.

Q. Do you feel that the disability—that the disability [13] in this man's knee now is not greater than ten per cent?

A. I don't know now. When I examined him, my impression at that time was somewhere between ten and fifteen per cent. That was just an offhand guess. These things are apt to advance—the arthritic changes are apt to advance and disability increase.

The DEPUTY COMMISSIONER.—I think that is all.

Mr. STAFFORD.—That is all, Doctor.

(Witness excused.)

Dr. A. B. HEATON, called as a witness on behalf of the employer and insurance carrier, and after having been first duly sworn by the Deputy Commissioner, was examined and testified as follows:

Direct Examination.

(By Mr. STAFFORD.)

Q. Your name, Doctor? A. Dr. A. B. Heaton.

Q. And you practice in Tacoma? A. Yes, sir.

Q. Where did you prepare for the practice of medicine, Doctor? A. Colorado University.

Q. Colorado University? A. Yes, sir.

Q. And how long have you been practicing?

A. About 13 years.

Q. You have been, of course, duly admitted and licensed to practice in the State of Washington?

A. Yes, sir. [14]

Q. Does your practice tend to occupy the major part of your time with any particular kind of work, Doctor? A. Yes, sir.

Q. What kind of work?

A. Now it is mostly women—obstretrics, but I was with the Tod Shipyards for two years.

Q. How long ago was that, Doctor?

A. That was from 1917 to 1919.

Q. 1917 and 1919?

A. 1917, 1918 and 1919; approximately two years.

Q. You did practice for those two years?

A. Approximately two years.

Q. And they were two consecutive years?

A. Oh, yes.

Q. Where was that—in Tacoma?

A. Yes, sir.

Q. What was your position with the shipyards, Doctor?

A. I had charge of the hospital on the grounds.

Q. Giving emergency relief?

A. Emergency relief and then follow up work too. The last eight months I was located, too, with Drs. Schaeffer and Hicks.

Q. What year did you graduate in, Doctor?

A. 1914.

Q. I thought you said that you practiced for thirteen years, didn't you?

A. Yes, sir. I had pretty nearly two years of interne work and that took me up to 1916.

Q. And you entered into the practice of medicine then in 1916? A. Yes, sir. [15]

Q. You have taken care of Mr. Matheson for how long, Doctor?

A. Oh, off and on for seven or eight years at least. That is, he and his family.

Q. I mean this particular case.

A. Oh, this particular case?

Q. Now, you say that you have taken care of him and his family for seven or eight years?

A. Yes, sir.

Q. Who in his family? A. His wife.

Q. Any children? A. No.

Q. You have taken care of Mr. Matheson in this particular case, too, have you? A. Yes, sir.

Q. State what your original findings were and what, if any changes you noticed in those findings, if you please.

A. On the start, of course, as he said—the first time he called me up on the telephone and told me he had sprained his knee, and I told him to give his knee a rest and apply linament and hot packs.

Q. Did you see him at that time? A. No, sir.

Q. How long after that phone call was it that you first saw him? A. Oh, probably ten days.

Q. What did your first examination disclose, if you recall, Doctor?

A. It showed tenderness on both sides of the knee—the right knee especially, over the lower part of the knee on the [16] right side, and then the internal lateral surface of the knee.

Q. Did you take any X-ray pictures at that time, Doctor?

A. No, there were not any X-ray pictures taken at that time.

Q. When were the first X-rays taken?

A. I have forgotten exactly when that was. I did not bring the notes here. As a matter of fact—I think the former testimony said six weeks or so. I didn't take any X-rays at all.

Q. You never ordered any X-rays?

A. No. The only X-ray taken was the one that has been referred to previously.

Q. You mean referred to by Dr. Schaeffer?

A. Yes, sir.

Q. Have you examined that X-ray?

A. Yes, sir.

Q. State your conclusions from seeing that.

A. The semilunar cartilage was flattened—thin—and showed calcification changes, and also calcification changes on the ends of the tibia.

Q. By "calcification" just what do you mean, Doctor? A. I mean enlarged bony growths.

Q. Does the flattening of the cartilage show in the X-ray?

A. Yes, sir. That is an external cartilage.

Q. Is there any calcification of either of those cartilages indicated? A. Yes.

Q. In your opinion are these bony changes and the calcification of these cartilages due to the injury or due to any other cause?

A. They were there evidently previous to the injury. [17]

Q. Which?

A. The bony changes. I mean those calcification changes.

Q. Were they extensive or of a minor degree?

A. They were more or less extensive.

Q. Throughout the knee-joint?

A. Yes. As was stated. In the cartilage and the edges of the bone ends.

Q. How would you account for those changes, Doctor?

A. Those are arthritic changes, probably from long standing infection.

Q. Have you ever had occasion to treat Mr. Matheson for any disease that could result in this infection? A. No, sir.

Q. Have you ever had occasion to treat Mr. Matheson for any disease that could result in this infection? A. No, sir.

Q. Have you ever had occasion to observe the condition of his teeth or his tonsils? A. Yes, sir.

Q. What would you say as to the condition of his teeth?

A. His teeth are quite bad and his gums are quite infected.

Q. When did you examine him as to those?

A. When I examined the knee.

Q. That was the first time you ever had occasion to examine them? A. Yes, sir.

Q. When was the last time, prior to this injury, that you did any service for Mr. Matheson?

A. Nothing very particular. Just an occasional cold and that sort of thing.

Q. What is the cause of Mr. Matheson's disability? His [18] present disability?

A. Well, it is a combination in my estimation of both the previous condition and the injury.

Q. What causes you to say that it is the result in any degree of the injury?

A. Because it has been—because the date of his disability and his inability to keep going for any length of time has dated from that injury.

Q. I mean, Doctor, not from his statements to you, but from your findings, what causes you to say that? A. Nothing. I cannot say.

Q. On the other hand, what causes you to say that the present disability is the result of these bony changes?

A. Because they are visible by X-ray.

Q. Could you, with any sound science, attempt to segregate the extent of the disability that is caused by the bony changes from the extent of the disability that is caused by the injury?

A. I don't believe so.

Mr. STAFFORD.—That is all.

Cross-examination.

(By the DEPUTY COMMISSIONER.)

Q. Would a knee in the condition you found Mr. Matheson's knee to be, be particularly susceptible —would the condition be particularly susceptible to aggravation or acceleration by reason of an injury?

A. Very much so.

Q. And if it were a fact that the man had been so employed during the preceding year so as to enable

him to earn $1829, and he had an injury, even with this pre-existing condition is there any ground or any fair basis upon which a conclusion [19] could be based that he would have had a disability since the date of the injury had it not been for the injury?

A. That is hard—it is hard to do that. We know that he was working steadily, and my knowledge of Mr. Matheson had lead me to believe to a large degree that the disability in his work was due to his injury.

Q. What in your opinion is the percentage of the disability of that knee at the present time?

A. Well, as to carrying on his work—

Q. (Interrupting.) No, considering the full function of the knee at 100%?

A. Oh, I should say 30 or 40 per cent at least—possibly more. You mean, as regards—

Q. (Interrupting.) As regards his ability to use that knee now.

A. At least that much because I know that he cannot use it very long at a time.

The DEPUTY COMMISSIONER.—That is all. [20]

Redirect Examination.

(By Mr. STAFFORD.)

Q. Doctor, also knowing Mr. Matheson as you do, would you say that it was mostly attributable to the injury? A. No, I didn't say that, Mr. Stafford.

Q. I thought that you did. Now, with reference to your statement, Doctor, the conclusion stated in

that is not based on any findings that you yourself made as a physician, is it?

A. As a physician, yes. General as well as locally.

Q. All right.

A. But as far as locally is concerned, you cannot base that—I could not say that, no.

Q. Now, let us get it straight. Is it based on any local findings? A. No.

Q. What general findings is it based on?

A. Just my knowledge of the man and observing him when he did not know that he was being observed—going down the street, for instance.

Q. State some of those observations?

A. In going down the street—after he has rested a little while—for instance, in the office or where he has been standing talking, when he starts off he starts off pretty bravely, but by the time that he has gone a block he is limping.

Q. What causes you to concluded from that that it is the result of the injury?

A. Because he did not do that beforehand.

Q. When did you last see him before?

A. I have seen him off and on—he used to come up to the office and chew the fat around and come up and tell me about [21] his wife. She had a lot of gall bladder trouble, and so forth, and he never acted that way before.

Q. Had you ever had occasion to examine him before?

A. Not particularly. I have noticed that he has always walked kind of knock-kneed.

Q. During the last seven or eight years?

A. Yes, sir.

Q. How do you get at your 30 to 40 per cent disability rating, Doctor?

A. Due to the fact that he could not do more than that amount of work without going bad.

Q. As I understand it—what do you mean by 30 to 40 per cent? 30 to 40 per cent of what?

A. Of a day's work.

Q. That is not what we are looking for here. We are looking at 30 to 40 per cent, figuring the normal function of the knee as 100 per cent.

The DEPUTY COMMISSIONER.—Of the leg.

Mr. STAFFORD.—Yes, of the leg as 100 per cent.

Q. Now, how do you arrive at the conclusion that Mr. Matheson is disabled 30 to 40 per cent in the functioning of this leg?

A. He has 100 per cent of the leg for a little while, but it does not last.

Q. Well, what findings can you point to that would justify this conclusion?

A. Just simply the—how long it takes him to play out. That is all.

Mr. STAFFORD.—That is all.

The DEPUTY COMMISSIONER.—That is all.

(Witness excused.) [22]

Mr. STAFFORD.—Now, before this hearing terminates, Mr. Marshall, I wish to make two—shall we call them motions? The first is, that we be permitted to present authorities generally and par-

ticularly under section 8, subsection (f) (2) The second motion is that we adjourn the hearing to Seattle to make it possible to take the oral testimony of Drs. Rodger Anderson and Buckner, we agreeing as carriers to pay Mr. Matheson's entire expense so that he will be able to attend this hearing at your office.

I make these motions because the principle involved here is one of serious import and touches on the administration of the act generally.

The DEPUTY COMMISSIONER.—You have no objection to having a hearing over at Seattle, you getting your expenses paid to go over there?

The CLAIMANT.—I have done everything that you have wanted me to *go*. Now it has been seven weeks that has been going on since you people stopped my pay. I cannot live on wind, and I am not able to work and you have stopped my pay, and I have got a wife to take care of.

The DEPUTY COMMISSIONER.—Your expenses will be paid, Mr. Matheson.

The CLAIMANT.—What am I going to get when I get there? I owe everybody now.

The DEPUTY COMMISSIONER.—They will take care of that.

Mr. STAFFORD.—I will mail the expenses to Mr. Matheson in advance.

The CLAIMANT.—You people have stopped my compensation, and I am crippled and I cannot work longshoring. [23]

The DEPUTY COMMISSIONER.—The hearing will be continued until Tuesday, June 24, 1929,

at Seattle, at the office of the Deputy Commissioner, 452 Colman Block, at 5:30 P. M.

Mr. STAFFORD.—And I will have a check to Mr. Matheson before that time.

I hereby certify that the above and foregoing is a true and accurate transcript of my shorthand notes in the above-entitled matter, taken under the direction of the Deputy Commissioner.

(Signed) E. E. LESCHER. [24]

EXHIBIT "B."

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION.

Before WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District.

#31–38.

MARTIN MATHESON,

Claimant,

vs.

NORTHWESTERN STEVEDORING CO.,

Employer.

OCCIDENTAL INDEMNITY CO.,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY AT FURTHER HEARING.

Pursuant to oral notice, this matter was heard before Wm. A. Marshall, Deputy Commissioner, United States Employees' Compensation Commis-

sion, at Seattle, Washington, on the 4th day of June, 1929.

APPEARANCES:

The Claimant Appearing in Person.

MATTHEW STAFFORD, Esq., Appearing for Employer and Insurance Carrier. [25]

Dr. H. T. BUCKNER, called as a witness on behalf of the employer and insurance carrier, and after having been first duly sworn by the Deputy Commissioner, was examined and testified as follows:

Direct Examination.

(By Mr. STAFFORD.)

Q. Doctor Buckner, you are a practicing physician in the state of Washington?

A. Yes, sir.

Q. Where did you study medicine?

A. I graduated from Jefferson Medical College, Philadelphia, Pennsylvania.

Q. You are regularly licensed and admitted to practice in the State of Washington?

A. Yes, sir.

Q. How many years have you practiced altogether? A. Sixteen years.

Q. Does your practice take on the form of a specialty in any particular line? A. Yes, sir.

Q. What is that specialty?

A. Bone and joint surgery.

Q. Did you, Doctor, on March 8, have occasion

to examine Martin Matheson, the gentleman sitting at your right? A. Yes, sir.

Q. State what your findings were.

A. Well—

Q. (Interrupting.) With particular reference to the right knee-joint, Doctor. [26]

A. Well, according to the examination, well nourished and well developed. Head: Eyes negative. Teeth show marked pyorrhea. Throat red and injected. Chest: Heart and lungs normal. Abdomen normal. Back: Spine is straight; can execute all motions normally; no muscle spasm. No evidence of injury to the back. Extremities: Both legs are the same length. Reflexes are normal. Sensation normal. There are many varicose veins of both legs with marked brownish discoloration which usually accompanies such conditions. Has marked flattening of both feet, both longitudinal and transverse arches. There is also some pronation of both feet. Right knee: There is a slight knock-knee tendency with some slight limitation in flexion and extension. There is a slight lateral instability. Attempted movement to obtain complete extension causes severe pain. The patella freely movable. There is no effusion. There is no thickening of the periarticular structures. There is some tenderness on the inner side of the knee in the region of the internal lateral ligament. There is no tenderness along the attachment of the internal semilunar cartilage.

Q. Did you take an X-ray of his knee, Doctor?

A. Yes, sir.

Q. What condition did it show?

A. It showed no evidence of any fracture. He had a marked lipping, indicate of an osteo-arthritis.

Q. You say that this indication of an osteo-arthritis was marked? A. Yes, sir.

Q. What evidence of disability caused by injury did you find, Doctor?

A. He sustained an injury to the internal lateral ligament. [27]

Q. Is that what is commonly known as a sprain of the knee, Doctor? A. Yes, sir.

Q. What would you estimate the extent of Mr. Matheson's permanent partial disability, *relating this* disability to the right knee-joint, and considering the normal function of that knee-joint as 100 per cent, what would you consider to be Mr. Matheson's permanent partial disability directly resulting from this accident?

A. Well, I would estimate his relaxation of the knee to be about ten per cent—that is, of the internal lateral ligament.

Q. If the bony changes which you found so marked in Mr. Matheson's knee from the X-rays had never been affected by the injury, was the condition sufficiently progressive so that it would in your opinion ultimately disable him?

A. Yes, it would.

Q. If there had been no arthritis present in this knee, was there any finding to indicate any circumstances resulting from the injury which

would keep him from recovering as the normal sprain of a knee would recover?

A. No, if he did not have any arthritis in his knee I should think that he would make an ordinary recovery. He might have some relation of the lateral ligament.

Mr. STAFFORD.—That is all.

Cross-examination.

(By the DEPUTY COMMISSIONER.)

Q. Doctor, on what basis do you base your prognosis that he would have a disabled knee because of the arthritis? Is that a general statement or are you able to say that at any definite time he would become disabled?

A. No, he is a man past 63. His period of doing hard [28] work is past. Bony changes normally appear in the bone in and about the joints. He has a degree of focal infection, of marked pyorrhea and a red and injected throat, which is an indication of infection and arthritic bony changes of that type are more or less a progressive disease, anyway.

Q. Yes, but we have herein the evidence, Doctor, testimony to the effect that this workman earned between $1800 and $1900 during the preceding year.

A. I know, but at the same time the condition might have been accelerated to a certain extent by that.

Q. Isn't it entirely probably, Doctor, that an in-

jury such as this could have lightened up or aggravated his pre-existing condition?

A. It probably aggravated it or accelerated the condition to a certain extent, yes.

Q. In other words, if I might put it this way, would not a knee in that condition be particularly susceptible to injury?

A. Oh, yes, I should say that.

Q. With regard to this injury to the internal lateral ligament, in your judgment is any surgical operation indicated, Doctor? A. No, sir.

Q. Under the circumstances? A. No, sir.

Q. What in your judgment, Doctor, is the total disability of that knee at the present time irrespective of the cause of the disability, using the full function of the knee as one hundred per cent?

A. The disability of the knee?

Q. The entire disability of the knee, from whatever cause.

A. Oh, from different causes—that is, even though he [29] has a disease of the joint?

A. Yes.

A. Why, I should not think that he has more than 15% or 20% at the very maximum of the disability of the knee.

Q. Even with the arthritic condition?

A. Yes, sir. He should be able to do—I know of others with the disease who do light work and get around and do many things.

The DEPUTY COMMISSIONER.—I think that is all then.

Mr. STAFFORD.—That is all.

(Witness excused.)

Dr. ROGER ANDERSON, called as a witness on behalf of the claimant, and having been first duly sworn by the Deputy Commissioner, was examined and testified as follows:

Direct Examination.

(By the DEPUTY COMMISSIONER.)

Q. Doctor, you are a regularly licensed and practicing physicial and surgeon here in Seattle?

A. Yes, sir.

Q. Did you examine Martin Matheson at my request some time ago? A. Yes, sir.

Q. What condition did you find there, Doctor, with regard to an injury that occurred to his right knee?

A. May I take just a second to read this report over because I did not have time to read it before?

Q. Yes, that is all right. Now, Doctor, having read that report over, you found at the time of your examination that there was a hyperthropic osteo-arthritis, and you also stated from the [30] description of the accident, "This one change could readily result in an injury to the external lateral ligament and to its attached external cartilage," and that the injury had also aggravated his pre-existing arthritis? A. Yes, sir.

Q. Now, Doctor, coming back to the heart of

this situation. In your estimate here of 15% of disability, does that include the total disability that might exist—that exists now in Mr. Matheson's right knee from whatever cause. That is stating the question differently. We have a workman here who has earned between $1800 and $1900 within the preceding year. The testimony is that he was not troubled with the knee before. He now says that he is disabled. We have the testimony of arthritis and an admission on the part of all the physicians that an injury of this character would probably aggravate any pre-existing arthritis condition. Now, the thing that I am desiring to learn—that I am desiring to ascertain in your judgment as to what the total disability of the knee is now by that arthritis—whether it be from arthritis or from an aggravation of the arthritis by reason of injury and the disability from the injury too.

A. In my opinion—I examined him on the 12th of April, 1929, and my opinion is that there was at least 35 to 45 per cent of disability in regard to the function of his right leg taken as a whole for his heavy previous duty of longshoring, both as a result—that is, the disability is both the result of his existing arthritis and of his injury.

Q. The leg, in the condition in which this right leg of Mr. Matheson was at the time of the injury, was one that is particularly susceptible to injury?

A. Yes, sir.

Q. Is there any way definitely to determine that

had it [31] not been for the injury he would have been disabled at any particular time or at any certain time in the future?

A. Will you repeat that, please?

Q. Is there any way to determine with any degree of certainty that had not the accident occurred he would have been disabled because of his arthritis alone in the future—at any particular time?

A. It is unable to state to my knowledge from any method as to when he would be disabled, but I could add as a qualifying statement to that that usually if arthritis is in one knee it is in the other knee, I think, too concurrently in regard to symptoms.

Q. Was there any examination made to ascertain whether the other knee had an arthritic condition in this case? I have had no testimony of that so far from any of the physicians.

Mr. STAFFORD.—There is testimony by Dr. Schaffer to the effect that the left knee did not show the same bony changes.

Q. Just for your information, Doctor, Dr. Schaffer, the physician who attended him, says that there were no bony changes in the other knee.

Mr. STAFFORD.—The X-ray shows that.

The DEPUTY COMMISSIONER.—You can question the doctor, Mr. Stafford.

Cross-examination.

(By Mr. STAFFORD.)

Q. Dr. Anderson, in your report to Mr. Mar-

shall, dated April 12, 1929, did you not state that in your opinion there will be a 15% per cent permanent partial disability of the functions of the right knee? A. Yes. [32]

Q. How do you reconcile that statement with your statement to-day of 35 to 45% disability?

A. The statement that I made to-day is at the time that I examined him, both as a result of the accident and of the disease. At that date there was that amount, at that time, for hard work.

Q. Well, then, what does the 15%—pardon me, if you want to continue your answer.

A. And in any event, regardless of how much recovery there will be, later on as he gets back to work and as he gets used to it, there will be a residual 15% disability.

Q. Then it was your opinion at the time that you examined him that he was not in a fixed condition?

A. I believe I stated before, "A period of six months has now elapsed since his accident and I believe he can now safely attempt to return to work if he is capable to continue." There was some doubt in my mind, you see, whether he would be able to continue, but he should give it an honest attempt. So that shows that there is some doubt in my mind as to whether at that time he was entirely recovered.

Q. Well, Doctor, do you think that a man could safely attempt to return to work if he was suffering from 35% to 45% disability of a knee?

A. Yes.

Q. For longshore work?

A. Yes. As a matter of attempting it at that time. I think that he is going to get better. If he gradually goes to work and limbers it up, he will get better. I have cases of knees which, so far as the function of the leg goes, they are working now—in private work for themselves, and they have in my opinion 50% disability as compared to a full, healthy adult, as far [33] as that leg goes, but they are able to carry on. What were you, a hatch-tender, Mr. Matheson?

The CLAIMANT.—I was hatch-tender at the time.

The WITNESS.—It makes some different in my opinion as to what these men do. Now, a hatch-tender, he can return to that work with his leg off sometimes.

The CLAIMANT.—Provided I sit down and tend hatch.

The WITNESS.—Yes. Of course there are different types.

Q. Now, Doctor, you say that 35 to 45% disability existed at the time that you examined him, and that there was some prospect of his condition improving. Is that correct?

A. Yes.

Q. What in your opinion would be the ultimate degree of permanent partial disability which would result directly from the accident?

A. Well, I would say that it would be approximately 15% as the result of the accident. That is

the intention of that sentence that was not completed. I should add that to that sentence.

Mr. STAFFORD.—That is all.

Redirect Examination.

(By the DEPUTY COMMISSIONER.)

Q. Doctor, in your opinion is this man's condition practically stationary, or will his condition improve?

A. I think that as of the time of April 12 he will improve.

Q. Then April 12 was not the proper time to estimate his permanent disability in your judgment—finally? A. Finally?

Q. Yes.

A. I think there will be some improvement and if he is [34] able to go back to work we would more definitely be able to determine the eventual disability.

Q. Irrespective of the cause of the disability will 15% be the total disability that this man will probably have, irrespective of the cause of the disability?

A. No. He may have a greater disability than that, and it is the history of these cases that following injury, contrary to what I said before, occasionally the injury stirs up the arthritis and they gradually or occasionally quickly get worse. The arthritis itself.

The DEPUTY COMMISSIONER.—That is all.

Recross-examination.

(By Mr. STAFFORD.)

Q. But at the time that you examined him, Doctor, on April 12, if was your opinion, as I understand you to say a while ago, that the degree of permanent partial disability then apparent and directly attributable to the injury was about 15%?

A. It was my opinion that as a result of the accident there would be a 15% permanent partial disability of this leg.

Mr. STAFFORD.—That is all.

The DEPUTY COMMISSIONER.—If it is conceded that an injury to that leg with the pre-existing arthritic condition has resulted in increasing or accelerating or aggravating the arthritic condition, then the 15% would not be a true estimate, is that right, Doctor?

The WITNESS.—Yes. In some cases it would not be enough because it aggravates them, but not in all cases does the injury aggravate them.

The DEPUTY COMMISSIONER.—That is all.

(Witness excused.)

The DEPUTY COMMISSIONER.—With that the hearing is concluded. [35]

I hereby certify that the above and foregoing is a true and accurate transcript of my shorthand notes taken in the above-entitled matter under the direction of the Deputy Commissioner.

E. E. LESCHER. [36]

EXHIBIT "C."

United States Employee's Compensation Commission, Fourteenth Compensation District.

CASE No. 31–38.

In the Matter of the Claim for Compensation Under the LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

MARTIN MATHESON,

Claimant,

Against

NORTHWESTERN STEVEDORING COMPANY,

Employer.

OCCIDENTAL INDEMNITY COMPANY,

Insurance Carrier.

COMPENSATION ORDER AWARD OF COMPENSATION.

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and hearings having been duly held in conformity with law,

The Deputy Commissioner makes the following

FINDINGS OF FACT.

That on the 18th day of October, 1928, the claimant above named was in the employ of the employer above named at Tacoma in the State of Washing-

ton, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Occidental Indemnity Company; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a longshoreman on board the steamship "Point Reyes," said steamship being then situated [37] at Tacoma, in the State of Washington; that while the claimant above named was so employed he stepped between some loose dunnage and the hatch coaming, wrenching his knee and resulting in his disability; that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; that the employer furnished claimant with medical treatment, etc., in accordance with section 7 (a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of $1,839.54; that as a result of the injury sustained the claimant was wholly disabled from October 20, 1928, to April 12, 1929, inclusive, except for five days during which he continued his employment; that as a result of his injury claimant has a permanent partial disability equivalent to 40% of such disability as he would have sustained if he had lost his right leg, for which he is entitled to 115.2 weeks compensa-

tion; that the employer has paid $563.04 to claimant as compensation.

Upon the foregoing facts the Deputy Commissioner makes the following

AWARD.

That the employer, Northwestern Stevedoring Company, and the Insurance Carrier, Occidental Indemnity Company, shall pay to the claimant compensation as follows: 115.2 weeks at $23.46 per week, amounting to the sum of $2,702.59; that there is now due and payable to the claimant 33 weeks compensation at $23.46 per week, amounting to the sum of $774.18, and covering the period from October 18, 1928, to June 5, 1929, inclusive; that the employer shall have credit for $563.04 previously paid to claimant as compensation; that the remainder of compensation shall be paid to claimant bi-weekly.

Given under my hand at Seattle, Washington, this 6th day of June, 1929.

WM. A. MARSHALL,
Deputy Commissioner, Fourteenth Compensation District. [38]

PROOF OF SERVICE.

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the Claimant, the Employer and The Insurance Carrier at the last known address of each as follows:

Martin Matheson, c/o Geo. Smith, International Longshoremen's Association, 1353 Commerce St., Tacoma, Washington.

Northwestern Stevedoring Company, 201 Central Bldg., Seattle, Washington.

Occidental Indemnity Company, c/o Matthew Stafford, 501 Colman Bldg., Seattle, Wash.

WM. A. MARSHALL,
Deputy Commissioner.

Mailed June 6, 1929.

[Endorsed]: Complaint with Exhibits, etc. Filed in the United States District Court, Western District of Washington, Southern Division, Jul. 2, 1929. Ed. M. Lakin, Clerk. By E. Redmayne, Deputy. [39]

APPEARANCE OF ATTORNEYS.

To the Clerk of the Above-entitled Court:

You will please enter our appearance as attorneys for William A. Marshall, Dep. Comr., U. S. Employees' Compensation Comm., in the above-entitled cause, and service of all subsequent papers, except writs and process, may be made upon said William A. Marshall by leaving the same with

ANTHONY SAVAGE, U. S. Attorney.

JOHN T. McCUTCHEON, Asst. U. S. Attorney. Office Address: 324 Federal Bldg., Tacoma, Wash.

[Indorsed]: Filed Jul. 8, 1929. [40]

NOTICE OF APPEARANCE OF ATTORNEYS.

To the Above-named Complainants and to Messrs. Bogle, Bogle & Gates, Their Counsel:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned hereby enters appearance on behalf of the defendant, Martin Matheson, as his solicitor, and request that notice of all further proceedings be served upon him at his office below specified.

Dated at Tacoma, Washington, this 5th day of July, A. D. 1929.

WESLEY LLOYD,
Solicitor for Defendant Martin Matheson.

Office and P. O. Address: 527–532 Perkins Building, Tacoma, Washington.

[Indorsed]: Filed Jul. 5, 1929. [41]

MOTION AND AFFIDAVIT FOR INTERLOCUTORY INJUNCTION.

Come now the complainants, Northwestern Stevedoring Company, a corporation, and Occidental Indemnity Company, a corporation, by their solicitors, Bogle, Bogle & Gates, and move the Court for an interlocutory injunction, staying the payment of the amounts required by the compensation order and award of compensation referred to in the bill of complaint herein, pending the final decision

herein, on the ground and for the reason that irreparable damage would otherwise ensue to the complainants.

This motion is based upon the records and files herein, and upon the affidavit of Frank G. Taylor, Washington agent for the complainant, Occidental Indemnity Company, a corporation, hereto attached, and upon the verified bill of complaint on file herein.

BOGLE, BOGLE & GATES,
Solicitors for Complainants. [42]

United States of America,
State of Washington,
County of King,—ss.

Frank G. Taylor, being first duly sworn, on oath deposes and says: That he is the Washington agent of the complainant, Occidental Indemnity Company, a corporation. That he has this day verified the bill of complaint, and by this reference makes the same a part hereof, as though fully set forth herein at length.

That the defendant, Martin Matheson, is insolvent, and if an interlocutory injunction is not issued herein staying the payment of the amounts required to be paid by the compensation order and award of compensation referred to in the bill of complaint herein, said payments will have to be made, and if the complainants herein are successful in this action, said payments cannot be recovered from the defendant Martin Matheson, and said com-

plainants will lose the benefits of any favorable decision herein. That by reason thereof said complainants will suffer irreparable damage.

FRANK G. TAYLOR.

Subscribed and sworn to before me this 2d day of July, 1929.

[Seal] STANLEY B. LONG,

Notary Public in and for the State of Washington, Residing at Seattle.

[Indorsed]: Filed Jul. 2, 1929. [43]

NOTICE OF HEARING (JULY 5, 1929).

To William A. Marshall, Deputy Commissioner Fourteenth Compensation District Under the Longshoremen's and Harbor Workers' Compensation Act, and to Martin Matheson, Defendants:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the complainants herein will bring on for hearing before the above-entitled court at Tacoma, Washington, at ten o'clock A. M. on the 5th day of July, 1929, the hereto attached motion for interlocutory injunction herein.

BOGLE, BOGLE & GATES,
Solicitors for Complainants.

[Indorsed]: Filed Jul. 2, 1929. [44]

NOTICE OF HEARING (JULY 8, 1929).

To Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District Under the Longshoremen's and Harbor Workers' Compensation Act, and to Martin Matheson, Defendants, and Wesley Lloyd, Attorney for Martin Matheson:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the complainants herein will bring on for hearing before the above-entitled court, at Tacoma, Washington, at 10:00 o'clock A. M. on Monday, July 8, 1929, the motion for interlocutory injunction herein, heretofore notice for hearing on the 5th day of July, 1929.

BOGLE, BOGLE & GATES,
Solicitors for Complainants.

[Indorsed]: Filed Jul. 9, 1929. [45]

MEMORANDUM DECISION ON COMPLAINANTS' APPLICATION FOR AN INTERLOCUTORY STAY OF COMPENSATION AWARD.

Filed July 13, 1929.

Complainants a carrier and its insurer under Sec. 21 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1436; 33 U. S. C. A. Sec. 921) in their complaint ask that a compensa-

tion award of the Deputy Commissioner be set aside and that, pending final decision, the award be stayed.

The matter is now before the Court upon an application for such stay.

BOGLE, BOGLE & GATES, Central Bldg., Seattle, Wash., Solicitors for Complainants.

ANTHONY SAVAGE, U. S. Attorney, Seattle, Wash., JOHN T. McCUTCHEON, Asst. U. S. Attorney, Tacoma, Wash., Attorneys for Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District under Longshoremen's and Harbor Workers' Compensation Act.

WESLEY LLOYD, 140 Perkins Building, Tacoma, Wash., Solicitor for Defendant, Martin Matheson.

Complainants Cite: Title 33, U. S. C. A., Sec. 908, Subdivision [46] f (1) and (2); Title 33 U. S. C. A., Sec. 921, subdivision b; Indian River Steamboat Co. vs. East Coast Transportation Co., 10 So. 480, 487; 28 Fla. 387; 29 Am. St. Rep. 258; Cause vs. Perkins, 56 N. C. 177, 179; 69 Am. Dec. 728; Deegan vs. Neville, 29 So. 173, 175; 127 Ala. 471; 85 Am. St. Rep. 137; Kerlin vs. West, 4' N. J. Eq. (3 H. W. Green) 449; 4 Words and Phrases 3773; Cleveland vs. Martin, 75 N. E. 772, 777; 218 Ill. 73; 3 L. R. A. (N. S.) 629; Devon vs. Pence, (Ky.) 106 S. W. 874, 875; 32 C. J. 64.

Defendant, Matheson, cites: Obrecht-Lynch Corporation vs. Clark, 30 Fed. (2d) 144; F. Jarka Co. vs. Monahan, etc., 29 Fed. (2d) 741; Howard vs.

Monahan, 31 Fed (2d) 480; Merchants' and Miners' Transportation Co. vs. Norton, 32 Fed. (2d) 513.

CUSHMAN, District Judge.—The findings of fact and award of the Deputy Commissioner are as follows:

* * * * * * * * * * *

"Such investigation in respect to the above-entitled claim having been made as is considered necessary, and hearings having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT.

That on the 18th day of October, 1928, the claimant above named was in the employ of the employer above named at Tacoma in the State of Washington, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act; and that the liability of the employer for compensation under said Act was insured by Occidental Indemnity Company; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a longshoreman on board the steamship 'Point Reyes,' said steamship being then situated at [47] Tacoma, in the State of Washington; that while the claimant above named was so employed he stepped between some loose dunnage and the hatch coaming, wrenching his knee and resulting in his disability; that notice of injury was

given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; that the employer furnished claimant with medical treatment, etc., in accordance with section 7 (a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of $1,829.54; that as a result of the injury sustained the claimant was wholly disabled from October 20, 1928, to April 12, 1929, inclusive, except for five days during which he continued his employment; that as a result of his injury claimant has a permanent partial disability equivalent to 40% of such disability as he would have sustained if he had lost his right leg, for which he is entitled to 115.2 weeks compensation; that the employer has paid $563.04 to claimant as compensation.

Upon the foregoing facts the Deputy Commissioner makes the following

AWARD.

That the employer, Northwestern Stevedoring Company, and the Insurance Carrier, Occidental Indemnity Company, shall pay to the claimant compensation as follows: 115.2 weeks at $23.48 per week, amounting to the sum of $2,702.59; that there is now due and payable to the claimant 33 weeks compensation at $23.48 per week, amounting to the sum of $774.18, and covering the period from October 18, 1928, to June 5, 1929, inclusive; that the employer shall have credit for $563.04 previously paid to

claimant as compensation; that the remainder of compensation shall be paid to claimant by-weekly."

* * * * * * * * * * *

The Deputy Commissioner and the injured longshoreman are made parties defendant. The affidavit of Frank G. Taylor, Washington agent of the complainant Occidental Indemnity Company, to the effect that the injured defendant is insolvent is not disputed. It follows that denial of the stay, pending final determination, would irreparably injure the complainants if the injured defendant should be found, upon final decree, not entitled to any part of the amount awarded him.

It is the contention of complainants that the finding by the Deputy Commissioner of a 40% disability is unsupported by the evidence; that the evidence shows the existence of an [48] arthritic condition existing before the injury which arthritis was a partial disability; that while the evidence shows the injury aggravated the arthritis and resulted in an increased degree of disability, that there is no evidence that such increase exceeds 15% of the disability that would have been sustained by the loss of the leg.

If there is no evidence that the disability exceeds 15%, before this case would probably be tried and determined there would have been paid under the award an amount greater than properly allowable. Therefore, it will be assumed, with that fact made certain that complainants would sustain irreparable injury from a denial of the stay but the Court is

unable to find that such fact is made reasonably certain.

The only evidence as to the relative amount of disability to be attributed to the arthritis before the injury as distinguished from the arthritis as aggravated by the injury, expressed in percentages, is the opinion evidence of doctors and surgeons.

The Deputy Commissioner finds—the parties before him agreeing—that the average annual earnings of the claimant (longshoreman) at the time of his injury amounted to the sum of $1,829.54. That this amount is substantially less than that earned by a longshoreman under no disability is not shown.

Of opinion evidence, it has been said:

> "J. Weight of Opinion—1. In General. The weight to be given to opinion evidence in any given case is, within the bounds of reason, entirely a question for the determination of the jury, whether the inference or conclusion of an observer, or the judgment of an expert. The judgment of experts, even when unanimous and uncontroverted, is not necessarily conclusive on the jury and they may disregard it. The credibility of witnesses being a question for the jury in all [49] cases, the opinion of the expert, although upon the precise point to be passed upon by the jury, does not relieve them of the power and consequent responsibility of deciding, and they may believe a less technically trained set of witnesses. * * * "

It is apparent that the Deputy Commissioner considered that the evidence of the actual amount being

earned by the claimant at the time of his injury outweighed the opinion evidence of the expert witnesses.

The Court is unable to say that in finding that claimant had suffered a 40% disability from the injury the Deputy Commissioner acted without evidence.

The stay prayed will be denied.

[Endorsed]: Filed Jul. 13, 1929. [50]

ORDER DENYING MOTION FOR INTERLOCUTORY INJUNCTION.

This matter having heretofore come on for hearing upon the motion of the complainants for an interlocutory injunction, the complainants being represented by their solicitors, Bogle, Bogle & Gates, and the defendant Wm. A. Marshall being represented by his solicitor, Anthony Savage, United States Attorney, and John T. McCutcheon, Assistant United States Attorney, and the defendant, Martin Matheson, being represented by his solicitor, Wesley Lloyd, and the Court having considered the bill of complaint on file herein and the affidavit in support of said motion and the memorandum briefs in connection therewith, and having heretofore entered a memorandum decision, now, therefore, it is

ORDERED, ADJUDGED AND DECREED that said motion for interlocutory injunction be, and the

same is hereby denied, to which complainants except, and their and each of their exceptions is hereby allowed.

Dated this 18th day of Sept., A. D. 1929.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Filed Sep. 18, 1929. [51]

PETITION FOR APPEAL.

To the Honorable EDWARD E. CUSHMAN, District Judge:

The above-named complainants, feeling aggrieved by the order denying motion for interlocutory injunction rendered and entered in the above-entitled cause on the 18th day of September, 1929, do hereby appeal from said order to the Circuit Court of Appeals for the 9th Circuit for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 9th Circuit under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

NORTHWESTERN STEVEDORING COMPANY.
OCCIDENTAL INDEMNITY COMPANY,
Claimants,
By BOGLE, BOGLE & GATES.
Their Solicitors. [52]

ORDER ALLOWING APPEAL AND FIXING BOND.

Appeal allowed upon giving bond as required by law for the sum of $2,000.00, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal.

Done in open court this 14th day of October, 1929.

EDWARD E. CUSHMAN,
District Judge.

Please take notice of presentation at ten o'clock A. M. on October 14, 1929.

BOGLE, BOGLE & GATES,
Solicitors for Complainants.

Copy received this 14 day of October, 1929.

ANTHONY SAVAGE,
JOHN T. McCUTCHEON,
Solicitors for Defendant Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District Under Longshoremen's and Harbor Workers' Compensation Act.

WESLEY LLOYD,
Solicitor for Defendant Martin Matheson.
[53]

[Indorsed]: Filed Oct. 14, 1929. [54]

ASSIGNMENT OF ERRORS.

Now comes the complainants in the above-entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause from the order made by this Honorable Court on the 18th day of September, 1929:

1. That the United States District Court for the Western District of Washington, Southern Division, erred in entering said order denying complainants motion for an interlocutory injunction, on the ground and for the reason that it appears from the record herein that the defendant, Martin Matheson, is insolvent, and that, therefore, any payments made under the award pending the decision herein, if eventually favorable to the complainants, could not be recovered, and irreparable

damage would result to the complainants, and because said order is contrary to law.

WHEREFORE, the complainants and appellants pray that said decree be reversed, and that said District Court for [55] the Western District of Washington, Southern Division, be ordered to enter an order and decree reversing the decision and order of the lower court in said cause.

BOGLE, BOGLE & GATES,
Solicitors for Complainants and Appellants. [56]

Copy received this 14 day of October, 1929.

ANTHONY SAVAGE,
JOHN T. McCUTCHEON,
Solicitors for Defendant Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District Under Longshoremen's and Harbor Workers' Compensation Act.

WESLEY LLOYD,
Solicitor for Defendant Martin Matheson.

[Indorsed]: Filed Oct. 14, 1929. [57]

STATEMENT OF EVIDENCE TO BE INCLUDED IN RECORD.

This cause came on for hearing before the Hon. Edward E. Cushman, Judge of the above-entitled court at Tacoma, Washington, on July 8, 1929, upon the motion of the complainants for an interlocutory injunction, said motion being considered

and heard upon the affidavit of Frank G. Taylor attached to said motion, and the verified bill of complaint on file herein, no testimony being offered by the defendants, said affidavit being as follows, to wit:

"United States of America,
State of Washington,
County of King,—ss.

Frank G. Taylor, being first duly sworn, on oath deposes and says: That he is the Washington agent of the complainant, Occidental Indemnity Company, a corporation. That he has this day verified the bill of complaint, and by this reference makes the same a part hereof, as though fully set forth herein at length.

That the defendant, Martin Matheson is insolvent, [58] and if an interlocutory injunction is not issued herein, staying the payment of the amounts required to be paid by the compensation order and award of compensation referred to in the bill of complaint herein, said payments will have to be made, and if the complainants herein are successful in this action, said payments cannot be recovered from the defendant, Martin Matheson, and said complainants will lose the benefits of any favorable decision herein. That by reason thereof said complainants will suffer irreparable damage.

FRANK C. TAYLOR.

Subscribed and sworn to before me this 2d day of July, 1929.

[Notarial Seal] STANLEY B. LONG,
Notary Public in and for the State of Washington,
Residing at Seattle."

BOGLE, BOGLE & GATES,
Solicitors for Complainants.

To Solicitors for Defendants:

Please take notice of the lodgment of the foregoing statement of evidence to be included in record in the Clerk's office this 14 day of October, 1929, and the presentation thereof for approval to the Honorable Edward E. Cushman, the Judge who heard this cause at his courtroom in the Federal Building at Tacoma, Washington, on the 28 day of October, 1929, at ten o'clock A. M.

BOGLE, BOGLE & GATES,
Solicitors for Complainants. [59]

The foregoing statement of evidence to be included in the record being true, complete and properly prepared, is hereby approved and made a part of the record herein this 14 day of October, 1929.

EDWARD E. CUSHMAN,
District Judge.

Copy received and approved for entry October 14, 1929.

ANTHONY SAVAGE,
JOHN T. McCUTCHEON,
Solicitors for Defendant Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District Under Longshoremen's and Harbor Workers' Compensation Act.
WESLEY LLOYD,
Solicitor for Defendant Martin Matheson.

[Indorsed]: Filed Oct. 14, 1929. [60]

NOTICE OF APPEAL.

To WM. A. MARSHALL, Deputy Commissioner Fourteenth Compensation District Under Longshoremen's and Harbor Workers' Compensation Act, Defendant, and ANTHONY SAVAGE, U. S. Attorney, and JOHN T. McCUTCHEON, Asst. U. S. Attorney, His Solicitors, and to *Defend* MARTIN MATHESON and WESLEY LLOYD, His Solicitor:

NOTICE IS HEREBY GIVEN that the complainants, Northwestern Stevedoring Company, a corporation, and Occidental Indemnity Company, a corporation, hereby appeal to the United States Circuit Court of Appeals for the 9th Circuit from the order denying their motion for an interlocutory injunction, which said order was duly entered

herein on the 18th day of September, 1929, and from each and every part thereof.

NORTHWESTERN STEVEDORING COMPANY.
OCCIDENTAL INDEMNITY COMPANY.
By BOGLE, BOGLE & GATES,
Their Solicitors. [61]

Copy received this 14th day of October, 1929.

ANTHONY SAVAGE,
JOHN T. McCUTCHEON,
Solicitors for Defendant Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District Under Longshoremen's and Harbor Workers' Compensation Act.
WESLEY LLOYD,
Solicitor for Defendant Martin Matheson.

[Indorsed]: Filed Oct. 14, 1929. [62]

CITATION ON APPEAL.

United States of America,—ss.

To WM. A. MARSHALL, Deputy Commissioner Fourteenth Compensation District Under the Longshoremen's and Harbor Workers' Compensation Act, and MARTIN MATHESON, Defendants and Appellees, GREETING:

You and each of you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the 9th Circuit in

the city of San Francisco, State of California, thirty days from and after the day this citation bears date pursuant to an order allowing an appeal filed and entered in the Clerk's office in the District Court of the United States for the Western District of Washington, Southern Division, from an order denying motion for interlocutory injunction, signed, filed and entered on the 18th day of September, 1929, in that certain suit being in Equity No. E.–393, wherein Northwestern Stevedoring Company, a corporation, and Occidental Indemnity Company, a corporation, are complainants and appellants, and you are defendants and appellees, to show cause, if any there be, why the order rendered against the said appellants as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, Southern Division, this 14th day of October, 1929.

EDWARD E. CUSHMAN,
District Judge.

Copy received this 14 day of October, 1929.

ANTHONY SAVAGE,
JOHN T. McCUTCHEON,
Solicitors for Defendant Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District Under Longshoremen's and Harbor Workers' Compensation Act.

WESLEY LLOYD,
Solicitor for Defendant Martin Matheson.

[63]

SUPERSEDEAS AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Northwestern Stevedoring Company, a corporation, and Occidental Indemnity Company, a corporation, as principals, and United States Fidelity & Guaranty Co., a corporation, duly organized to transact a surety business in the State of Washington, as surety, are held and firmly bound unto Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and Martin Matheson, defendants in the above-entitled cause, in the full sum of Two Thousand ($2,000.00) Dollars, lawful money of the United States to be paid to them and their respective executors, administrators and successors, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each

of our heirs, executors and administrators by these presents.

Sealed with our seals and dated this 16th day of October, 1929.

WHEREAS, the above-named principals have prosecuted an [64] appeal to the United States Circuit Court of Appeals for the 9th Circuit, to reverse the order of the District Court for the Western District of Washington, Southern Division, in the above-entitled cause made and entered on September 18, 1929, denying their motion for interlocutory injunction herein.

NOW, THEREFORE, the condition of this obligation is such that if the above-named principals shall prosecute their said appeal to effect and if they fail to make their plea good shall answer all costs and pay (without prejudice to the right, if any, thereafter to recover the same), all sums accrued and payable under the award of Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, made and entered June 6, 1912, a copy of which said award is attached to the bill of complaint herein as Exhibit

'C,'' then this obligation shall be void; otherwise to remain in full force and effect.

NORTHWESTERN STEVEDORING COMPANY,
OCCIDENTAL INDEMNITY COMPANY,
By BOGLE, BOGLE & GATES,
LAWRENCE BOGLE,
Their Solicitors,
Principals.

[Seal]

UNITED STATES FIDELITY AND GUARANTY CO.
By JOHN C. McCOLLISTER,
Its Attorney-in-fact,
Surety.

State of Washington,
County of King,—ss

On this 16th day of October, 1929, before me personally appeared Lawrence Bogle, to me known to be one of the solicitors for and on behalf of said corporations that executed the within and foregoing instrument as principals, and acknowledged the said instrument to be the free and voluntary act and deed of said corporations for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument. [65]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

EDWARD G. DOBRIN,
Notary Public in and for the State of Washington, Residing at Seattle.

State of Washington,
County of King,—ss.

On this 16 day of October, 1929, before me personally appeared John C. McCollister, to me known to be the attorney-in-fact of the corporation that executed the within and foregoing instrument as surety, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed thereto is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

EDWARD G. DOBRIN,
Notary Public in and for the State of Washington, Residing at Seattle.

The foregoing bond and the sufficiency of the surety thereon is approved as a cost bond and a supersedeas bond on appeal and all further proceedings herein be and the same are hereby stayed.

Dated this 16th day of October, 1929.

EDWARD E. CUSHMAN,
District Judge.

Copy received and approved for entry this 16th day of October, 1929.

ANTHONY SAVAGE,
JOHN T. McCUTCHEON,
Solicitors for Defendant Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District Under Longshoremen's and Harbor Workers' Compensation Act.

WESLEY LLOYD,
Solicitor for Defendant Martin Matheson.

[66]

[Indorsed]: Filed Oct. 17, 1929. [67]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above-entitled Court:

You will please prepare the record on appeal to the United States Circuit Court of Appeals for the 9th Circuit in the above cause to consist of all necessary papers, including the following:

1. Bill of complaint (with caption).
2. Appearance of defendant Wm. A. Marshall, etc.
3. Appearance of defendant Martin Matheson.
4. Motion and affidavit for interlocutory injunction.
5. Notice (hearing 5th day of July, 1929).

6. Notice (hearing July 8, 1929).
7. Memorandum decision on complainant's application for an interlocutory stay of compensation award.
8. Order denying motion for interlocutory injunction.
9. Petition for appeal.
10. Assignment of errors.
11. Statement of evidence to be included in record. [68]
12. Notice of appeal.
13. Citation on appeal.
14. Supersedeas and cost bond on appeal.
15. This praecipe.
16. Clerk's certificate.

You are requested, except on the bill of complaint, to omit all captions except the name of the paper and to transmit such record to the Clerk of said United States Circuit Court of Appeals for the 9th Circuit in the manner provided by law.

BOGLE, BOGLE & GATES,
Solicitors for Complainants and Appellants.

Copy received this 24th day of October, 1929.

ANTHONY SAVAGE,
JOHN T. McCUTCHEON,
Solicitors for Defendant and Appellee, Wm. A. Marshall, etc.

WESLEY LLOYD,
Solicitor for Defendant Martin Matheson.

[Endorsed]: Filed Oct. 24, 1929. [69]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL.

United States of America,
Western District of Washington,—ss.

I, Ed M. Lakin, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that the foregoing pages numbered from one to seventy inclusive are a full, true and correct copy of so much of the record and proceedings in the case of Northwestern Stevedoring Company, a corporation, and Occidental Indemnity Company, a corporation, complainants, against Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and Martin Matheson, Defendants, in Cause No. 393—Equity, in said District Court, as is required by praecipe of counsel filed and shown herein, and as the originals thereof appear on file and of record in my office at Tacoma in said District.

I further certify that I hereto attach and transmit the original citation in said cause with acceptance of service thereon.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred in my office on behalf of appellant herein for making the record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's Fees (Act Feb. 11, 1925) for making record, certificate and return (115 fols.) @ 15¢ ea.....$17.25
Appeal 5.00
Seal ..... .50

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Tacoma, Washington, this 8th day of November, A. D. 1929.

ED M. LAKIN,
Clerk.
By Alice Huggins,
Deputy Clerk. [70]

[Endorsed]: No. 5980. United States Circuit Court of Appeals for the Ninth Circuit. Northwestern Stevedoring Company, a Corporation, and Occidental Indemnity Company, a Corporation, Appellants, vs. Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act, and Martin Matheson, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed November 11, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the
United States Circuit Court of Appeals
For the Ninth Circuit

NORTHWESTERN STEVEDORING COMPANY, a corporation, and OCCIDENTAL INDEMNITY COMPANY, a corporation,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremens' and Harborworkers' Compensation Act, and MARTIN MATHESON,
Appellees.

No. 5980

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEES

ANTHONY SAVAGE,
U. S. District Attorney,
JOHN T. MCCUTCHEON,
Asst. U. S. District Attorney,
For Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District;

WESLEY LLOYD,
For Martin Matheson, Office and P. O. Address: 527-532 Perkins Building, Tacoma, Washington;
Appellees.

Stanley Bell Printing Co.

FILED
MAR 3 - 1931
PAUL P. O'BRIEN,

In the
United States Circuit Court of Appeals
For the Ninth Circuit

NORTHWESTERN STEVEDORING COMPANY, a corporation, and OCCIDENTAL INDEMNITY COMPANY, a corporation, *Appellants*,

VS.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremens' and Harborworkers' Compensation Act, and MARTIN MATHESON, *Appellees.*

No. 5980

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEES

The appellants have fairly, though briefly, stated the essential facts upon which the appeal is based. Addressing ourselves, then, immediately to the argument of the appellants, we will undertake to

demonstrate that the District Court was entirely warranted in refusing injunctive relief.

The appellants complain that the District Court has, in effect, disposed of their bill upon the merits. It was not only the duty of the Court to pass upon the merits of the controversy as set forth in the appellants' bill, but by such consideration of the merits the District Court was precluded from granting the injunctive relief prayed for. In the analysis of the case as presented by the appeal, we do not deem it necessary to enter upon a discussion of the right to injunctive relief in a proper case, nor to undertake to distinguish the rule as laid down by the District Judge in the case of *Benson v. Crowell*, 33 Fed. (2d) 137, for the reason that, whatever view this Court might take of the proposition as announced by the District Judge in that case, that question is not at issue here.

In this case, the appellants filed their bill seeking a review, and it will be observed that the only allegation in the bill which might entitle them to any equitable relief is contained in paragraph six thereof, which reads as follows:

> "That said compensation order and award of compensation is not in accordance with law and the provisions of the Longshoremen's and Harbor Workers' Compensation Act."

This is a conclusion of law, pure and simple, and cannot aid the pleader. The bill does allege that a

hearing was had before the Deputy Commissioner, and it sets forth by way of Exhibit "A" and Exhibit "B" a complete transcript of the testimony taken before the Deputy Commissioner, so that the only question that confronted the District Court was whether the bill itself, taken *pro confesso*, was sufficient to entitle the appellants to the equitable relief prayed for, upon which assumption, of course, they based their claim of right to injunctive relief.

It is, of course, elementary that an injunction will not lie to enforce *pendente lite*, a right that cannot be predicated upon the bill, and, as counsel for appellants says, the District Court has, in effect, ruled that the bill is vulnerable to a motion to dismiss for want of equity. In any event, it must stand or fall upon the testimony taken before the Commissioner. If that testimony fairly supports the Commissioner's finding and fairly warrants his order, then, of course, that order must stand, and in effect that is the finding of the District Judge on the denial of the injunction.

It may be conceded that the appellants would have a right to an injunction and to equitable relief in a proper case, but their bill in this case does not present facts which the District Judge concluded would warrant him in disturbing the Commissioner's finding.

The statute has made the Commissioner a finder of fact,

> Sec. 919 Title 33, U. S. Code, Compact Edition,

and though it further provides that hearing may be had upon a bill filed in the District Court in the event the Commissioner's decision is not in accordance with law, it certainly contemplates that the Commissioner's finding shall be *prima facie* evidence of its own verity, unless the complainants have alleged some fact which discredits it.

Appellants urge that they are entitled to a hearing *de novo*, but they plead no fact which could be a basis for further evidence than that taken before the Commissioner. They do not say or claim that they have new evidence or that the facts would be any different from the facts upon which the Commissioner's decision and finding are based. The District Court has then correctly concluded that, since the Deputy Commissioner had the witnesses before him and had evidence upon which his judgment might properly rest, there was nothing in the bill which would warrant the District Court in disturbing his finding. In other words, without allegations in the bill sufficient to raise an issue, the District Judge correctly ruled that he would not be justified in issuing an injunction.

The rule has been stated in the case of *Obrecht-Lynch Corporation vs. Clark*, 30 Fed. (2nd) 144, as follows:

> "The proper construction of the language in question seems to the Court to be that, as long as there is some competent evidence to support the finding of fact of the Commissioner, such finding is supported by rational and natural inferences from proved facts, the Court will not disturb such finding."

The Courts have in like cases been generally obliged to consider the merits of the case as a whole. In the case of *Merchants and Miners Trans. Co. vs. Norton et al.*, 32 Fed (2nd) 513, the District Judge, in passing upon the same question as is here presented, says:

> "The appellate revision by the Courts is restricted to the question of whether the order has been made in accordance with the law. The facts must thus be assumed to be as found."

Again, in the case of *F. Jaska Co., Inc., et al., vs. Monahan*, 29 Fed. (2nd) 741, the court holds that the finding of fact made by the Deputy Commissioner is a final adjudication.

Again, in the case of *Howard et al vs. Monahan*, 31 Fed. (2nd) 480, the decedent workman's representative challenged the sufficiency of the evidence before the Deputy Commissioner to sustain the finding, and alleged that it was not in accordance with law in that the evidence permitted no reasonable conclusion other than that the claimant's death was caused by the injury. The District Judge, in passing upon that claim, refused to grant the in-

junctive relief prayed for, and, as in the case at bar, considered the bill upon its merits, holding, among other things:

> "The conclusion of the Commissioner will be looked upon as a finding of fact."

The question under the rule, then, presented to this Court is whether or not there is substantial evidence in the record as pleaded by the complainant to sustain the Commissioner's finding. For the convenience of the Court we call attention to the following matters:

You will note that it was claimed by the experts introduced by the employer and insurer that the workman had a calcification of the semi-lunar cartilage. That is, bony changes had taken place about the knee joint, and arthritis of the injured knee was found. The question presented to the Commissioner was whether the injury or the arthritis caused the condition in which the workman was at the time of the hearing.

Dr. Schaffer, called by the employer, testified that there was no arthritis evident in the other knee. (Record, p. 12.)

Dr. Anderson, appointed to make the examination on behalf of the Commissioner, testified that if arthritis is present in one knee it usually is in the other, concurrently, too, in regard to symtoms.

Dr. Schaffer again testified as follows (referring to the injury):

Q. And would not that condition probably aggravate the arthritic condition?

A. Yes, sir.

P. 14, Record.

Dr. Heaton was called on behalf of the employer and testified as follows:

Q. What is the cause of Mr. Matheson's disability — his present disability?

A. Well, it is a combination, in my estimation, of both the previous condition, and the injury.

Q. What causes you to say it is the result, in any degree, of the injury?

A. Because it has been — because the date of his disability and his inability to keep going for any length of time has dated from that injury.

Q. Could you, with any sound science, attempt to segregate the extent of the disability that is caused by the bony changes from the extent of the disability that is caused by the injury?

A. I don't believe so.

Q. Would a knee in the condition you found Mr. Matheson's knee to be, be particularly susceptible — would the condition be particularly susceptible to aggravation or acceleration by reason of an injury?

A. Very much so.

Q. And if it were a fact that the man had been so employed during the preceding year, so as to enable him to earn $1,829, and he had an injury, even with this pre-existing condition, is there any ground or any fair basis upon which a conclusion could be based that he would have had a disability since the date of the injury, had it not been for the injury?

A. That is hard — it is hard to do that. We know that he was working steadily, and my knowledge of Mr. Matheson has led me to believe to a large degree that the disability in his work was due to his injury.

Q. What, in your opinion, is the percentage of the disability of that knee at the present time?

A. Oh, I should say thirty or forty per cent. at least — possibly more . . . . . at least that much, because I know that he cannot use it very long at a time.

Pp. 19-20-21, Record.

Dr. Buckner, also called on behalf of the employer, testified:

Q. Isn't it entirely probable, Doctor, that an injury such as this could have lightened up or aggravated his pre-existing condition?

A. It probably aggravated it or accelerated the condition to a certain extent, yes.

Q. In other words, if I might put it this way, would not a knee in that condition be particularly susceptible to injury?

A. Oh, yes, I should say that.

Pp. 29-30, Record.

Dr. Anderson, called by the Deputy Commissioner, on behalf of the claimant, testified:

(By the Commissioner):

. . . . . I am desiring to ascertain, in your judgment, as to what the total disability of the knee is now by that arthritis — whether it be from arthritis or from an aggravation of the arthritis by reason of the injury, and the disability from the inpury too?

A. In my opinion — I examined him on the 12th day of April, 1929, and my opinion is that there was at least 35 to 45 per cent. of disability in regards to the function of his right leg, taken as a whole, for his heavy previous duty of longshoring, both as a result — that is, the disability is both the result of his existing arthritis and of his injury.

Q. The leg, in the condition in which this right leg of Mr. Matheson was at the time of the injury, was one that is particularly susceptible to injury?

A. Yes, sir.

Q. Is there any way definitely to determine that had it not been for the injury he would have been disabled at any particular time or at any certain time in the future?

A. It is unable (impossible) to state to my knowledge from any method as to when he would be disabled, but I could add, as a qualifying statement to that, that if arthritis is in one knee, it is in the other knee, I think, too, concurrently in regards to symptoms.

Pp. 31-32-33, Record.

In consideration of the state of record, and in view of the fact that there is no affidavit of merits from which the trial judge could reasonably conclude that the complainants would probably ultimately prevail, we respectfully submit that the trial court was fully justified in denying the injunction prayed for.

ANTHONY SAVAGE,
JOHN T. MCCUTCHEON,
WESLEY LLOYD,
Attorneys for Appellees.

No. 6331

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of
GILBERT S. GORDON,
Bankrupt.

INDIA TIRE AND RUBBER COMPANY,
Appellant,

vs.

CARL O. RETSLOFF, Trustee in Bankruptcy of Gilbert S. Gordan, Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

FILED
NOV 1 1920

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of
GILBERT S. GORDON,
Bankrupt.

INDIA TIRE AND RUBBER COMPANY,
Appellant,

vs.

CARL O. RETSLOFF, Trustee in Bankruptcy of Gilbert S. Gordan, Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellant:

MINOR MOORE, Esq.,

C. V. CALDWELL, Esq.,

Stock Exchange Building, Los Angeles, California.

For Appellee:

TOMPKINS & CLARK,

WILL M. TOMPKINS,

Spreckels Building, San Diego, California.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

In the Matter of	)	
	(	In Bankruptcy
GILBERT GORDON,	)	No. 11544-M
	(	CITATION ON
Bankrupt.	)	APPEAL

*****

UNITED STATES OF AMERICA SS.

The President of the United States to Carl O. Retsloff, Trustee in Bankruptcy:

You are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, state of California, on the 8th day of August, 1929, pursuant to the appeal duly obtained and filed in the Clerk's office of the District Court of the United States for the Southern District of California, Southern Division, wherein you, as trustee in bankruptcy of Gilbert Gordon, bankrupt, are appellee, and India Tire and Rubber Company, a corporation, is the appellant, to show cause, if any there be, why the order and decree in said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf, and to do and receive that which may appertain to justice to be done in the premises.

Witness the Honorable Paul J. McCormick, judge for the District Court of the United States, Southern District of California, Southern Division, on the 8th day of July, 1929, in the year of our Lord one thousand nine hundred twenty-nine.

Paul J. McCormick
District Judge.

[Endorsed]: No. 11544-M. In the United States District Court Southern District of California, Central Division. In the matter of Gilbert Gordon, Bankrupt. Citation on Appeal. Received copy of the within Citation on Appeal this 17th day of July, 1929. Tompkins & Clark, Will M. Tompkins, attorneys for trustee. Filed Jul. 19, 1929, 3 P. M. R. S. Zimmerman, Clerk, by B. B. Hansen, Deputy Clerk. Minor Moore, C. V. Caldwell, Stock Exchange Building, Los Angeles, Calif. Trinity 4097.

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IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

--O--

In the Matter of	)	
	)	
GILBERT S. GORDAN,	)	IN BANKRUPTCY
	)	
Bankrupt.	)	

At LOS ANGELES, in the Southern District of California on the 9 day of July, 1928 came C. A. SCHWAN of Los Angeles, County of Los Angeles, State of California, and made oath and says:

That he is Asst Secretary of India Tire & Rubber Company, a corporation, incorporated by and under the laws of the State of W. Virginia, and carrying on business at Los Angeles, County of Los Angeles, State of California, and that he is duly authorized to make this Proof of Debt and execute this Letter of Attorney.

That the said Gilbert S. Gordan, the person ..... whom a petition for adjudication of Bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said claimant in the sum of Nine thousand Thirty-eight and 54/100 ($9,038.54) Dollars; that the consideration of said debt is as follows: Goods, wares and merchandise sold and delivered within four years last past by the claimant, an itemized bill of which, marked Exhibit "A" is hereto annexed and referred to as a part hereof.

That the treasurer is without the Southern District of California; affiant's duties most nearly correspond to those of treasurer; that no part of said debt has been paid; no note has been received, nor judgment rendered for said indebtedness, nor for any part thereof, except as hereinabove stated; that there are no setoffs or counter-claims to the same; that the purchase price of said goods, wares and merchandise became due on the dates set out on said itemized bill and that said claimant has not, nor has any other person by claimants order, or to the knowledge or belief of deponent or for claimant, had or received any manner of security whatever for said debt.

C. A. Schwan
Assistant Secretary.

[Jurat and power of attorney omitted]

[Endorsed]: A. In the United States District Court, Southern District of California, Southern Division. In the Matter of Gilbert S. Gordan, Bankrupt. Proof of Debt Due India Tire & Rubber Company for $9,038,54. Filed July 10, 1928. F. F. Grant, L. B. Referee in Bankruptcy. Filed May 7, 1929 at 1 o'clock P. M. R. S. Zimmerman, Clerk, B. B. Hansen, Deputy. Forward all Notices and Dividends to W. T. Craig, Attorney for Claimant 500 Board of Trade Building, Los Angeles, Cal.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

In Bankruptcy No. 11544-M

In the Matter of)
GILBERT S. GORDAN,) OBJECTIONS TO
Bankrupt.) PROOF OF DEBT.

TO F. F. GRANT, Esq., Referee in Bankruptcy:

I, Carl O. Retsloff, Trustee in this proceeding, do hereby object to the proof of debt filed on July 10, 1928, by the India Tire and Rubber Company, an alleged creditor, for Nine Thousand Thirty-eight and 54/100 Dollars ($9,038.54); the said objection is made upon the following grounds:

That prior to and within four months of the filing of the petition in bankruptcy by the bankrupt, the said India Tire and Rubber Company did remove and take possession of certain merchandise consisting of automobile tires and tubes to the value of Two Thousand Five Hundred Forty-six and 84/100 Dollars ($2546.84), knowing that said bankrupt was insolvent at the time said merchandise was taken from him.

I respectfully request that said proof of debt be rejected and disallowed and no dividends declared upon same.

Dated this 12th day of January, 1929.

Carl O Retsloff
Trustee.

[Endorsed]: No. 11544 In the District Court of the United States of the Southern District of California, Southern Division. In the matter of Gilbert A. Gordan, Bankrupt. Objections to Proof of Debt. Filed Jany

12/29 Referee Filed May 7, 1929 at 1 o'clock P. M. R. S. Zimmerman, Clerk, by B. B. Hansen, Deputy. Tompkins & Clark, 526 Spreckels Bldg. San Diego, California. Attorneys for trustee.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

In the Matter of	)	In Bankruptcy
	)	No. 11544-M
GILBERT S. GORDON,	)	ORDER SUSTAINING
	)	OBJECTIONS OF
Bankrupt	)	TRUSTEE.

This matter came on regularly to be heard on the 5th day of March, 1929, at the hour of ten A. M., Will M. Tompkins appearing as counsel for the Trustee herein, and Minor Moore appearing as counsel for the India Tire and Rubber Company, a corporation. Oral testimony and documentary evidence was produced by both parties, and on the 9th day of April, 1929, the court filed its Decision and Findings of Fact and Conclusions of Law.

That in accordance with said Findings of Fact and Conclusions of Law, and based upon the testimony and evidence adduced at the trial, it is

ORDERED, ADJUDGED AND DECREED that the Proof of Claim filed in this court by the India Tire and Rubber Company, a corporation, against the above named bankrupt in the sum of Nine Thousand Thirty-Eight and 54/100 Dollars ($9,038.54) be, and the same is hereby disallowed.

Dated this 23rd day of April, 1929.

F. F. Grant

Referee.

[Endorsed]: No. 11544-M. In the District Court of the United States, of the Southern District of California Southern Division. In the matter of Gilbert S. Gordon, Bankrupt. Order sustaining objections of trustee. Filed April 23/1929 F. F. Grant, Referee Filed May 7, 1929 at 1 o'clock P. M. R. S. Zimmerman, Clerk, by B. B. Hansen, Deputy. Tompkins & Clark 526 Spreckels Bldg. San Diego, California. Attorneys for trustee.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

- - -

In the Matter of)	
!	No. 11544-M.
GILBERT S. GORDON, (	Exceptions to Referee's
!	Order.
Bankrupt.)	

— — — — — — — — — — — !

Now comes India Tire & Rubber Company, a corporation, a creditor of the above named bankrupt, and files the following exceptions to the decision and order made on the 23rd day of April, 1929, by F. F. Grant, Referee in charge of this proceeding:

1. That said order was contrary to the evidence as shown by the record herein, and contrary to law;

2. Evidence was improperly received and considered by said Referee over objections of said India Tire & Rubber Company, as appears by the record hereof.

Dated: April 29th, 1929.

Minor Moore
C. V. Caldwell
Attorneys for India Tire & Rubber Company

[Endorsed]: No 11544. In the District Court of the United States for the Southern District of California, Southern Division. In the matter of Gilbert S. Gordon, Bankrupt. Exceptions to Referee's Order. Filed April 30/29 F. F. Grant, Referee. Filed May 7, 1929 at 1 o'clock P. M. R. S. Zimmerman, Clerk B. B. Hansen, Deputy. Minor Moore, Law offices 911 Stock Exchange Building, Los Angeles, Calif., Attorneys for India Tire & Rubber Company.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

- - -

In the Matter of)	
!	No. 11544-M
GILBERT S. GORDON, (	PETITION FOR
!	REVISION.
Bankrupt.)	
— — — — — — — — — — !	

To F. F. GRANT, Referee:—

Your petitioner respectfully shows: That it is a creditor of the above named bankrupt; that in the course of this proceeding, and on the 23rd day of April, 1929, an order, a copy of which is hereto annexed, was made and entered herein; that said order was erroneous in that:

1. The Referee improperly received evidence over the objections made by petitioner at said hearing, as shown by the record herein, which evidence was prejudicial to petitioner;

2. That said order is not supported by the evidence, and the Trustee failed to sustain the burden of proof which the law imposes upon him in the following particulars:

(a) The evidence is insufficient to show that the bankrupt, Gilbert S. Gordon, was insolvent at the time of the transfer of the merchandise to petitioner;

(b) The evidence is insufficient to show that petitioner had reasonable cause to believe at the time of said transfer that a preference would be affected by reason of said transfer;

(c) That the evidence is insufficient to show that petitioner at the time of said transfer had reasonable cause to believe that the debtor was insolvent.

(d) The evidence is insufficient to show that the merchandise transferred to petitioner was of the value claimed by the Trustee herein and found by the Referee.

WHEREFORE, your petitioner, feeling aggrieved because of said order, prays that the same may be reviewed as provided in the Bankruptcy Act and General Order No. 27.

Minor Moore
C. V. Caldwell

STATE OF CALIFORNIA)
(SS
COUNTY OF LOS ANGELES)

MINOR MOORE being first duly sworn deposes and says:

That he is the attorney of India Tire & Rubber Company, petitioner herein; that petitioner is a foreign corporation, and affiant is authorized to make this verification on its behalf; that he has read the foregoing petition and knows the contents thereof, and the same is true to the best of affiant's knowledge and belief.

Minor Moore

SUBSCRIBED and sworn to before me on this 29th day of April, 1929.

[Seal] C. V. Caldwell

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. 11544-M. In the District Court of the United States, District of Southern California, Southern Division. In the matter of Gilbert S. Gordon, Bankrupt. Petition for Revision. Filed April 30/29 F. F. Grant, Referee Filed May 7, 1929 at 1 o'clock P. M. R. S. Zimmerman, Clerk, B. B. Hansen, Deputy. Minor Moore, Law offices, 911 Stock Exchange Building Los Angeles, Calif., attorney for *petition.*

At a stated term, to wit: The January Term, A. D. 1929 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California on Tuesday the 25th day of June in the year of our Lord one thousand nine hundred and twenty-nine

Present:

The Honorable Paul J. McCormick, District Judge.

In the Matter of	)	
	)	
Gilbert Gordon,	)	No. 11544-M Bkcy.
	)	
Bankrupt.	)	

After an examination of the record and evidence filed herein, I am not satisfied that the Referee's decision disallowing the claim of the India Tire & Rubber Co. for

$9038.54 as preferential with knowledge of insolvency of debtor, is erroneous. Under such circumstances, said Referee's decision should not be disturbed, and it is therefore ordered on this review that the Referee's decision therein, as well as his order thereon dated April 9th, 1929 are and each is confirmed.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In the Matter of	)	
	(	Bankruptcy No. 11544-M
GILBERT GORDON,	)	STIPULATION.
	(	
Bankrupt	)	

It is hereby stipulated by and between Minor Moore and C. V. Caldwell, attorneys for Appellant and Tompkins & Clark, attorneys for Appellee, that the foregoing statement of the evidence taken and received in said matter is true and correct and contains all of the material evidence introduced upon the trial of said action, and the certificate of the Court as to the correctness of said statement is hereby waived.

Dated this 2nd day of October, 1929.

Minor Moore
C. V. Caldwell
Attorneys for Appellant
Will M. Tompkins
Attorneys for Appellee

It is so ordered
Edward J. Henning
Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In the Matter of	)
	(Bankruptcy No. 11544 M
GILBERT GORDON,	) EVIDENCE
	(RECEIVED UPON
Bankrupt	) THE TRIAL.

Upon the trial of this action before the Referee in Bankruptcy the following evidence was received, same being all of the material evidence offered or received before the Referee and upon a review being taken to the District Court a transcript of the testimony so received by the Referee was duly filed and was considered by the District Court in passing on the questions raised by the petition for review.

DIRECT EXAMINATION

By Mr. Tompkins

CARL O. RETSLOFF,

trustee of the estate of Gilbert Gordon, bankrupt, called as a witness, testified in his own behalf in objection to the allowance of the claim of appellant, as follows:

I am trustee of the estate of Gilbert Gordon, the bankrupt having appointed such trustee on July 10th, 1928. After my appointment I went to the place of business of the bankrupt and took over such books and records which I could find. I found certain credit slips of the India Tire & Rubber Company. I did not find the tires at the bankrupt's place of business which are described in the

(Testimony of Carl O. Retsloff)

credit slip dated April 18th, 1928 Among the credit slips was a credit memorandum which was offered and received in evidence, and marked Exhibit "A". and is as follows:

CREDIT MEMORANDUM

INDIA TIRE & RUBBER COMPANY

Factory Akron, Ohio

Los Angeles Branch

No. 67805

Approved by Gericke Date 4/18/28

CREDIT TO

Gordon's, San Diego California Folio No 29016

Salesman—Greenwood

Other reason for credit—To Liquidate Account

Terms—Gross

Quantity	Description	Price	Total
	We Credit your account with		
4	30x6 30 Reg Baln Cord	22 50	90 00
2	32x6 20 DO	23 50	47 00
2	32x6 75 DO	25 15	50 30
2	33x6 75 DO	26 10	52 20
			239 50

Duplicate

CREDIT MEMORANDUM

INDIA TIRE & RUBBER COMPANY

Factory Akron, Ohio

Los Angeles Branch

No 67805

Approved by Gericke Date 4/18/28

CREDIT TO

Gordon's, San Diego California Folio No 29017

Salesman—Greenwood

(Testimony of Carl O. Retsloff)

Other reason for credit—To Liquidate Account

Terms—Gross

Quantity	Description	Price	Total
	We Credit your account with		
2	30x6 20 Blue Tube	4 80	9 60
7	32x6 20 DO	4 95	34 65
2	30x6 75 DO	5 70	11 40
			55 65
	Less 5%		2 78
			52 87

Duplicate

CREDIT MEMORANDUM

INDIA TIRE & RUBBER COMPANY

Factory Akron, Ohio
Los Angeles Branch

No. 67806

Approved by Gericke Date 4/18/28

CREDIT TO

Gordon's, San Diego California Folio 29018.

Salesman—Greenwood

Other reason for credit—To Liquidate Account

Terms—Gross

Quantity	Description	Price	Total
	We credit your account with		
4	32x4½ Blue Tubes	3 45	13 80
2	35x5 Std Blue	4 60	9 20
6	30x5 DO S H S Tubes	4 95	29 70
6	34x7 DO	9 15	54 90
2	30x6 00 DO	3 65	7 30
2	31x6 00 DO	3 75	7 50
4	32x6 H S Tubes	6 65	26 60
			149 00

(Testimony of Carl O. Retsloff)

Less 10% 6-7" tubes	8 15	
Less 5% Blue	3 38	11 53
		137.47

Duplicate

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CREDIT MEMORANDUM

INDIA TIRE & RUBBER COMPANY

Factory Akron, Ohio

Los Angeles Branch

No. 67806

Approved by Gericke Date 4/18/28

CREDIT TO

Gordon's, San Diego California Folio 29019

Salesman—Greenwood

Other reason for credit—To Liquidate Account

Terms—Gross

Quantity	Description	Price	Total
	We credit your account with		
2	30x5 Std H S Cord	29 85	59 70
2	30x5 Dos H S Cord	33 40	66 80
2	32x6 DO	48 45	96 90
3	34x7 DO	68 65	205 95
20	29x4 40 Std Baln Cord	9 65	193 00
7	29x4 75 DO	12 55	87 85
4	30x4 75 DO	13 05	52 20
6	31x5 00 DO	14 60	87 60
			850 00
	Less 5% 5-6-7" Cords		21 47
			828 53

Duplicate

(Testimony of Carl O. Retsloff)

CREDIT MEMORANDUM

INDIA TIRE & RUBBER COMPANY
Factory Akron, Ohio
Los Angeles Branch

No. 67804

Approved by Gericke Date 4/18/28

CREDIT TO

Gordon's, San Diego California Folio 29015

Salesman—Greenwood

Other reason for credit—To Liquidate Account

Terms—Gross

Quantity	Description	Price	Total
3	28x5 25 reg Baln Cord	15 55	46 65
2	30x5 00 DO	14 10	28 20
3	32x5 00 SO	16 15	48 45
2	29x5 25 DO	15 95	31 90
1	31x6 00 DO		19 20
5	32x6 00 DO	19 70	98 50
5	33x6 00 DO	20 40	102 00
2	33x5 77 DO	21 85	43 70
			418 60

Duplicate

CREDIT MEMORANDUM

INDIA TIRE & RUBBER COMPANY
Factory Akron, Ohio
Los Angeles Branch

No. 67803

Approved by Gericke Date 4/18/28

CREDIT TO

Gordon's Service, 18th & B Sts, San Diego California

Folio 29014

Salesman—Greenwood

(Testimony of Carl O. Retsloff)

Other reason for credit—To Liquidate Account

Quantity	Description	Terms—Gross Price	Total
	We Credit your account with		
20	30x3½ Std Cl Cord	8 75	175 00
8	30x3½ 6 S Pass Cord	10 95	87 60
2	31x4 DO	13 75	27 50
8	32x4 DO	15 00	120 00
4	33x4 DO	15 75	63 00
6	32x4½ DO	19 80	118 80
2	33x5 Std H S Cord	32 95	65 90
4	35x5 DO	36 25	145 00
			802 80
	Less 5% 5″ Cords		10 55
			792 25

Duplicate

I knew Mr. Schwan, the credit man for the India Tire & Rubber Company, during his lifetime. I first met him at the first meeting of the creditors in this matter on or about July 10th. Mr. Schwan is now deceased. On the 10th of July, at the time of the first meeting of the creditors, Mr. Blodgett, Mr. Schwan and I had a conversation and I inquired of Mr. Blodgett as to what disposition his company would make of the note which they had received from Gilbert Gordon, the bankrupt, and the moneys received upon it, and Mr. Blodgett told me that his company would return the note and all moneys received upon the account. Mr. Schwan was willing to turn over all the merchandise taken by them and apply upon Mr.

(Testimony of Carl O. Retsloff)

Gordon's account. It was a well known fact, and Mr. Blodgett stated that he knew that Mr. Gordon was in a failing condition. Mr. Schwan told him that he knew that Gordon was broke and that he took his tires out and applied it upon Mr. Gordon's account for the reason that he knew that Mr. Gordan probably would not get out of bed again, as he was a very sick man at that time and wanted to get his account in shape. Later, and at the time of the second meeting of the creditors I had another conversation with Mr. Schwan and asked him what disposition he was going to make of his tires that he took out of Gordon's place of business prior to the petition. He said he was willing to turn them back or turn over any moneys derived from them by the India Tire & Rubber Co. The tires have never been returned to me and I have received no money from *from* the India Tire & Rubber Company.

CROSS EXAMINATION

By Mr. Moore

The first conversation I mentioned was at the first meeting of the creditors on July 10th, 1928. I asked Mr. Blodgett if he would be willing to turn back the note and it was in that connection that Mr. Blodgett told me that he knew that Mr. Gordon was in a failing condition. That, in substance, is the language he used.

Mr. Moore—Q. You would not say that was the phrase he used, or whether he referred to his physical or financial condition?

A. I gathered from the conversation that he was speaking of his financial condition more than of his physical condition.

(Testimony of L. D. Blodgett)

Q. You have no recollection of the words used, only that he was in a failing condition?

A. Only as I have stated. (Transcript p. 8, Vol 1)

At that time I asked Mr. Schwan what his attitude was, or that of his company would be, with reference to returning the tires and he said at that time that his company's attitude was to return the tires. In a later conversation Mr. Schwan stated, in answer to a question that I asked, that he was willing to return the merchandise and would do so.

REDIRECT EXAMINATION

By Mr. Tompkins

I was present at your office at a time between the first and the second meetings of creditors. Mr. Schwan, yourself and myself were present. At that time Mr. Tompkins told Mr. Schwan that the Richfield Oil Company had agreed to return a note and the moneys received upon the note and turn it over to the trustee. Mr. Tompkins asked Mr. Schwan when he was going to return the tires that he had agreed to return and that were taken by the India Tire & Rubber Co. and Mr. Schwan made the statement at that time that he was attending to the matter and that there would be a return made of either the value of the tires or the tires themselves.

L. D. BLODGETT,

a witness for the Trustee, examined by Mr. Tompkins, testified as follows:

I am district manager of the Richfield Oil Company. In January, 1928 I first learned that Gilbert Gordan was in financial difficulty and substantiated it further in Feb-

(Testimony of L. D. Blodgett)

ruary, 1928. In the latter part of January Mr. Gordon voluntarily put himself on a cash basis with the Richfield Oil Co. and from that time on he was on a cash basis until the bankruptcy. During the months of January and February I was in frequent communication with Mr. Schwan. I do not know whether I wrote him until after the 8th of May but prior to that he came to San Diego at various times and endeavored to straighten out the affairs of the India Tire & Rubber Co. with Mr. Gordon and on every occasion he called upon me and I told him about our account being on a cash basis. On the 8th of May Mr. Greenwood, Mr. Schwan and myself had a conversation. They came to my office and we discussed the Gordon matter at some length. We then went to Mr. Gordon's home and had a conversation with Mr. Gordon relative to his financial condition in general and upon Mr. and Mrs. Gordon refusing to explain where their assets had dwindled to and a request from Mr. Swanholm that he would like to have a financial statement of that date, which resulted in a very upset condition on the part of Mrs. Gordon, finally they consented that we should go over to the service station and invoice the stock. After the stock had been invoiced and an appraisal made of the value of the building and equipment we then went down to my office again and there we discussed the thing pro and con, and in making this statement there was a note made that the Richfield Oil Co. had received from Mr. Gordon to apply upon account a note due him from W. H. Breon of Brawley. Mr. Schwan spoke for the India Tire & Rubber Co. and said if the Richfield Oil Co. would replace, in the event of bankruptcy, their note received on account from

(Testimony of L. D. Blodgett)

Mr. Gordon, that the India Tire & Rubber Co. would replace the $2500.00, or some such sum, worth of tires that had been received from the Gordon station in April and it was definitely agreed on that date between the four of us.

I received a letter of April 4th from the India Tire & Rubber Co. which was in reply to a letter I had written to them. The letter was offered and received in evidence as Objector's Exhibit "B" and is as follows:

April 4th, 1928

Mr. L. D. Blodgett
District Manager, Richfield Oil Co.,
1302 Crosby St.,
San Diego, Calif.

Dear Mr. Blodgett:

Many thanks for your letter of April 2nd, regarding Gordon's Service Station.

I was in San Diego yesterday and had a long talk with Mrs. Gordon and Gilbert. I appreciate the motive that prompted you writing me and absolutely agree with you as far as the necessity of Mrs. Gordon having a good salesman to handle her business. The only unfortunate part as far as securing one lies in the fact that she is hardly able, under the present circumstances, to pay a man on a salary basis, and as you know, it is exceptionally hard to get any one worth while to do any sales work on a straight commission arrangement.

Nevertheless I am trying to secure someone for her that would be satisfactory. It is certainly regrettable that all this misfortune should be wished on one family, and we are all in hopes that Gilbert will soon be himself again.

Yours very truly,
India Tire & Rubber Co.
By W. R. Wheatley, Manager

(Testimony of L. D. Blodgett)

This letter was dated April 4th, 1928. At the time of the conversation of May 8th Mr. Gordon had said to us in his home that he would go voluntarily into bankruptcy. In that same conversation Mr. Schwan had discussed with us the return of the tires. After the conversation of May 8th I attempted to work out a scheme to relieve him in his financial condition and I took up that question with Mr. Schwan of the India Tire & Rubber Co. The conversations I had with Mr. Schwan from January up until the bankruptcy were mainly with reference to the financial standing of Mr. Gordon. After the conversation of May 8th I received a letter on Nelson & Price, Inc. stationery signed by Mr. Schwan. The letter, marked Exchibit "C", was offered and received in evidence and is as follows.

Los Angeles, Cal, May 17, 1928

Mr. L. J. Blodgett,
C/o Richfield Oil Co.,
San Diego, Calif.
Dear Mr. Blodgett:

As per conversation had with you the other day the following wire was sent to factory:

"Paul C. Searles: Blodgett of Richfield Oil Co. endeavoring to have Gordon prevail on Lessor of San Francisco to advance money or guarantee accounts of sufficient amount which would enable Gordon as he regains his health to resume business, Gordon to sign notes for full indebtedness Stop. Agreement to have proper safeguards limiting amount of personal withdrawals Stop If any profit made to prorate quarterly with creditors Stop

(Testimony of L. D. Blodgett)

Richfield and Bank will favor such an arrangement your opinion please immediately Wire

C. A. Schwan"

Answer received as follows:

"We approve Blodgett plans provided Lessor will guarantee Gordon's business Stop Deem it advisable Mr & Mrs Gordon both sign notes Stop Evidently Gordon is improving in health, which if true, pleases us greatly. Stop. Keep us advised as to developments and Lessor's final decision. P. C. Searles."

From Mr. Searles reply it is very evident the India Tire Co. will do their part, but of course, they must be protected and any measures that are taken to assist Mr. Gordon must be in accord with the three principle creditors. I believe what ever arrangements are made should be made as speedily as possible so as to conserve the assets and save for the creditors all that can possibly be salvaged, otherwise the principles involved might just play along and dissipate all the assets and then just say "it can't be done."

Trusting to hear from you within a very short time. I am

Yours very truly,

India Tire & Rubber Co.

CAS/EO C. A. Schwan

The exact amount of our claim against the bankrupt is $3,996.40. We have returned all payments which were received to the trustee.

(Testimony of L. D. Blodgett)

CROSS EXAMINATION

By Mr. Moore

Mr. Gordon gave me a written financial statement in January, which has been lost, dated the 1st or 2nd of January, showing a net worth of $17,000.00 or thereabouts. I remember he made a statement to our company in April. I think the copy you now show me is the statement which he made to us in April. It shows a net worth of $4,748.88. I also saw a Dun's statement or report. Dun's report, as I recall it, gave him a net worth of $25,000, but I do not know the date of that. I saw a copy of it at the First National Bank on the 8th of May. Your company had a copy of it, if I remember correctly. When I stated that I learned in January that Gordon was in a bad way financially that statement was based on the fact that Gordon had requested that we put him on a cash basis and upon a statement made by Gordon to me that his accounts receivable were uncollectable to a very large degree.

I first met Mr. Schwan with Mr. Schiller in 1927. He talked to me every time he came down and I am pretty sure that we discussed the Gordon matter in January. It was on the 24th day of March that we received the note from Breeon on account. Sometime in the month of March Mr. Schwan called upon me and I told him that we were anticipating this Breeon note on the account. He knew that from the time we took it over. He knew that we had the note as Mr. Gordon was setting it up as one of his assets in his statement. I remember distinctly discussing the matter with Mr. Schwan, the exact date I cannot state. I remember I talked with Mr. Schwan

(Testimony of L. D. Blodgett)

about getting a salesman for the Gordon place. We discussed it at quite some length over the telephone in April some time. He wired me from Seattle about financing this case so we would not take a loss. My remembrance is that the first time we discussed returning the assets was when we became aware of the fact that Gordon might take bankruptcy proceedings in order to avoid paying his creditors. That was the day we went out to their home that we agreed that if we put our stuff back they would put their stuff back. Prior to that time every effort had been made on the part of Mr. Schwan and myself to get Mr. Atherton, his attorney, to get some one to refinance Mr. Gordon so that we could get ahead out of this period of depression and bring ourselves out of the woods.

REDIRECT EXAMINATION

By Mr. Tompkins.

Q. By the court: Was anything said between you and Mr. Schwan prior to the 18th of April concerning the solvency or insolvency of Mr. Gordon?

A. Yes, that is just what I tried to show, that at that time and two or three times, Mr. Schwan and I discussed Mr. Gordon's financial worth.

THE COURT: Was that prior to the 18th of April, 1928.

A. Yes.

THE COURT: When was that?

A. That I cannot tell, but it was at one of his periodical visits.

THE COURT: Prior to that time? A. Yes, sir.

THE COURT: What conversation did you have with Mr. Schwan relative to the solvency or insolvency of Mr. Gordon prior to April 28th?

(Testimony of L. D. Blodgett)

A. That would be difficult to answer as to exactly when.

THE COURT: Was it ever mentioned? A. Yes, sir.

THE COURT: In what way? How was it mentioned?

A. In an effort to work out plans to safeguard ourselves from loss. (Transcript p. 29, Vol. 1)

Mr. Gordon had a brother-in-law in San Francisco, a Mr. Lessar, and at one time Mr. Lessar had given the India Tire & Rubber Co. a guarantee for a certain bill of goods. After Mr. Gordon had been taken sick Mr. Schwan told me that he had endeavored to get Mr. Lessar to again endorse or guarantee Mr. Gordon's account. If my memory serves me right, he made a trip to San Francisco for that purpose. The reason why we did not extend Mr. Gordon further credit after January was because he had a large amount of accounts receivable which he could not collect.

The Court: Did you know he was solvent or insolvent after April 8th?

Mr. Moore: We object to that as immaterial.

The Court: It is, but there is an angle where I want to get.

A. We had that in mind when we endeavored to work out a plan. I believed in January, and at a later date, that if Mr. Gordon could get the backing that Mr. Schwan thought he could get from Mr. Lessar he would be able to work out and put himself on easy street again.

It is stipulated between counsel that the Mr. Schwan referred to in the testimony was the Credit Manager of the India Tire & Rubber Co. in this district between the

(Testimony of Frank E. Kelly)
first of January up until the date of the adjudication of the bankrupt in 1928.

FRANK E. KELLY,

witness for the claimant, India Tire & Rubber Company, examined by Mr. Moore testified as follows:

I am chief clerk of the Bradstreet Company, Los Angeles branch, and have held that position since 1921. The little orange slip shown me is an inquiry ticket written by me at the office of Bradstreet Company in the presence of Mr. Schwan. After that I put in a search for Mr. Schwan and secured a report on Gilbert Gordon. The ticket is dated March 15th. The business of the Bradstreet Company is gathering, formulating and furnishing information for subscribers and the request made by Mr. Schwan was in the regular course of business. After receiving the request I gave directions to some one in the office of the Bradstreet Company to endeavor to obtain information concerning Gordon. The ticket was sent out to the reporting window and when the information was gathered the report was formulated in the office. After the report was completed it was handled by the Mail Clerk. In gathering information for this report we made a personal call for information, solicitation and communicated with San Diego with our reporter, Fred J. Lovejoy. Aside from this we had trade information, experience of the trade, creditors and information from people who had done business with Mr. Gordon. I forwarded the report, after it was formulated, to Mr. Schwan on the 21st day of March, 1928. The letters T. D. on the bottom of the report mean in our code ten to twenty thousand dollars.

(Testimony of Frank E. Kelly)

We have four grades of credit. "D" is our second grade of credit, that is, ten to twenty thousand second grade credit. The report marked Exhibit 1 was received in evidence and is as follows, and includes the orange slip referred to by the witness:

FINANCIAL CONDITION: A financial statement of his affairs is not available at this time, as he is reported to be ill, and those in charge claimed inability to submit late figures.

The last statement we have is under date of November 5, 1926, at which time claimed the following:

Assets:		
Merchandise	$11,161.50	
Accounts receivable	12,366.72	
Cash in bank	3,761.50	
Cash in hand	376.50	
Machinery and fixtures	1,450 00	
Option on business property	7,000 00	
Buildings, etc	6,000 00	
Studebaker car	1,600 00	
Chevrolet car	650 00	
		44,366.55
Liabilities:		
Open accounts for merchandise (not due this month		2,413.83
Accts payable for merchandise (Due in Dec & Jan)		15,528 48
Owing on cars		426 80
		18,369.11
Net worth		25,997.44

(Testimony of Frank E. Kelly)

Insurance on merchandise	$15,000
Insurance on buildings & equipment	7,500

Signed Gordon's Service

By Gilbert Gordon"

Authorities consulted state that there has been practically no changes in the business during the past year. It is stated that Gordon has been ill for the past several months, and the business has been at somewhat of a standstill. At the present time has only one salesman on the outside. Still has the India Tire Agency and has a substantial stock of tires on hand, and at the bank it is found that he has reduced his account to about $1000. The major portion of his cash being used for personal needs. Still has his option to purchase the business property, tho has not *purchase* same at this time. Has not increased his equipment investment any during the past year, and same would be subject to depreciation from credit standpoint.

Reported to be owing considerably for merchandise bills, tho the major portion of same understood to be on dating basis. After making necessary allowances, those consulted estimate worth around $10,000 to $15,000 net."

(Orange Slip)

1928 Report Only
BRADSTREETS
McComas Building—120 E 8th St
Los Angeles 2-25-28

The Bradstreet Co. gives in confidence and under the terms of our agreement with you, for our exclusive use, information concerning the responsibility, character, reputation, credit, etc. of

(Testimony of W. S. Storms)
Name Gordon Service
Business
Street & No.
City (or P. O.) San Diego, Calif.
County State
Signature of India Tire & Rubber Co, Subscriber
P. O. Address

(March 21, 1928—(in pencil)

CROSS EXAMINATION

By Mr. Tompkins

I do not know whether the statement procured was true as to Mr. Gordon's financial condition.

W. S. STORMS,

called as a witness for the claimant, examined by Mr. Moore, testified as follows:

I was a salesman for the India Tire & Rubber Co. in the years 1927 and 1928. During December 1927 I sold Mr. Gordon certain merchandise to be delivered in January 1928. In November 1927 I sold Mr. Gordon some merchandise and took back certain merchandise from him. The value of the merchandise taken back was $4500.00 and it was taken back in October, 1927. In April, 1928 I saw Mr. and Mrs. Gordon at San Diego. Mr. Gordon was quite ill and I did not discuss business with him except superficially. He was pretty sick. I did discuss business quite thoroughly with Mrs. Gordon. Ever since we did business with the Gordons it was Gordon and his wife, and all leases were signed by Mr. Gordon and Mrs. Gordon. We recognized them as partners and I saw Mrs. Gordon at the place of business many times helping him

(Testimony of W. S. Storms)

about the business. When I went there on April 4th, 1928 I told Mrs. Gordon I believed she had too much merchandise. She agreed that they had and that business had been quiet, that Mr. Gordon was sick and of course this was new merchandise, a comparatively new product upon which there was quite a substantial demand by all of our dealers in Southern California. I told Mrs. Gordon this: That inasmuch as they had approximately $5,000 or $6,000 worth of merchandise on hand I suggested that we get this stock out and return this merchandise for credit, as we had done many times before and still it would reduce their stock and it would help us out in giving us merchandise that we could give our dealers who needed it badly. Mrs. Gordon agreed that this was the proper thing to do and that is what I did. I went in and took out sizes on which they had a surplus and shipped them back to Los Angeles. At that time I had no financial statement from Mr. or Mrs. Gordon that indicated to me that they were not solvent. Mrs. Gordon stated that things had been particularly quiet, collections were slow and owing to the fact that Gilbert, her husband, was confined to his bed he was unable to get out and solicit business; that things were particularly quiet, and that she still hoped, was very hopeful, that he would be on his feet in a short time and would be able to resume his activities as he had in the past. She was very optimistic, as Mrs. Gordon has always been, and said nothing to me of any nature whatsoever regarding being unable to pay. In fact, she said that as far as a few bills they owed, they would be able to carry on the business and straighten those out in a short time.

(Testimony of W. S. Storms)

Before I came down to San Diego on the occasion that I took the tires back from Mr. Gordon I had a conversation with Mr. Schwan about the matter. I told Mr. Schwan that Mr. Gordon had a big stock of tires there and that he was sick and that we needed the merchandise and Mr. Schwan said he thought it was a good idea to take the merchandise we needed. We had quite a demand for it. We shipped the merchandise back to Los Angeles and put it back in stock. I had no talk with Mr. Gordon about being solvent or insolvent; the only question was the matter of his health. I had no reason to believe he was financially embarassed at that time. I first learned that he was insolvent about the first of June. I did not examine his books nor ask about his bills receivable. If there was any suspicion on my part as to their financial standing I would not ship them goods subsequent to the time we took this merchandise back. We took back the merchandise in October and sold them another bunch in January. There was no suspicion on my part that they were financially embarassed at the time I shipped these goods back from their stock. After I took the merchandise from their place of business I would say they had approximately $2,000 to $3,000 worth of stock still on hand. I did not take enough merchandise to cripple them. From the first of January, 1928 to the 14th of April, 1928, when I took the merchandise back we sold Gordon about $6500. worth of merchandise on credit in January, about $775.00 worth in February and March and about $115.00 in April, prior to the 14th of that month. The merchandise I refer to as having been sold to Mr. Gordon in January 1928 was actually sold in November, 1927 but was delivered in

(Testimony of Mr. Blodgett)

January, 1928. When we learned in February that Gordon's business was dormant we naturally paid particular attention to his business as we were short on merchandise. We took tires from other dealers. It is not an uncommon practice. My only thought about Gilbert Gordon was that he was quick sick. It never occurred to me that he would not be able to pay for these goods; on the contrary Mrs. Gordon was very optimistic about things and thought Mr. Gordon would get on his feet. I cannot say how much the merchandise which we took from Mrs. Gordon depreciated from January to the day we took it back. The tire market fluctuated. It was new merchandise and whether it would depreciate would depend upon the tire market.

MR. BLODGETT

recalled for further cross-examination by Mr. Moore testified as follows:

I prepared the statement now shown me with Mr. Schwan as a witness, some of the figures are mine and some are Mr. Schwan's. Mrs. Gordon gave me the figures, taking them from their books. Any information she gave me was supported by their books. The statement referred to, marked Exhibit III, was received in evidence and is as follows:

FINANCIAL STATEMENT

Name Gilbert S. Gordon — Mail Address 1170 18th St, San Diego

to

Richfield Oil Co. of California

The following statement showing my or our financial condition as of 4/26/28 is furnished for the purpose of obtaining credit for goods sold to me or us, and I or we hereby guarantee that the statements made herein are true and correct; and I or we agree to, and will, notify you immediately in writing of any unfavorable change; otherwise this is a continuing statement.

ASSETS		LIABILITIES	
Cash on hand (107.50) and in bank (200)	$307.50	Owe for borrowed money:	
Accounts receivable (good, not pledged or sold)	2,670.55	To Banks unsecured	$4500.00
Accounts slow (atty)	2,543.48	Owe for merchandise:	
Merchandise (at cost) Gas, lubricating oils (115.60) (187.50) grease, etc. (25.00)	328.10	Open acct, not due (India)	2467.01
Tires, Access. (2805.10) (100.00) repair parts, tubes (1048.65) (do not include consigned goods)	3,954.75	Open acct, past due R. O. Co.	3996.49
Automobiles (at cost)		Others—all small and current	80.00
New Buick 1200		Owe for automobiles	
Used Olds 100		Used—Buick	450.00
		Current liabilities	$11,493.50
		Total liabilities	4,748.88
		TOTAL	$16,242.38

Chevy.	450	1,750.00
Current assets		11,553.38
Machinery, fixtures, & equipment—present value (see Schedule B)		4,000.00
Other assets (Itemize) W. H. Breon note		689.00
Total		$16,242.38

MISCELLANEOUS INFORMATION

(Omitted questions to which no answer given)

Bank with (1) First National Address 5th Ave & Broadway

Do you pledge or sell your account or notes to banks, finance companies, or others? No.

Are any claims in attorney's hands, or any suits or judgments outstanding against you? No.

Previous business experience. Manufacture.

Where? San Francisco.

If leasing or renting garage property, fill in detail:

Owned by: Harry Lesser & C. Blanchard

Address: San Francisco

Lease expires: Indefinite

INSURANCE

Fire: Building $2500.00 Stock $10,000.00 Equipment $2500.00
Life: $10,000 Carried by Penn Mutual, payable to wife
" 20,000 " " Northwestern Life, payable to wife
5,000 " " Equitable, payable to wife.

Buy merchandise principally from

Name	Address
Richfield Oil Company	San Diego
India Tire & Rubber Company	Akron, Ohio
Motor Hardware	San Diego
Reuther Auto	San Diego

Name of individual, firm or corporation: Gordon's Service

(Signed by) Sadie Gordon

4-26-28

(Testimony of Mr. Blodgett)

REDIRECT EXAMINATION

By Mr Tompkins

The nature of the conversation had by me and Mr. Schwan on May 1st at the La Jolla Club House was that we were discussing two or three plans whereby Mr. Gordon could be refinanced to the end that all of us would receive what was coming to us. Prior to that, and on April 28th, we had discussed Mr. Gordon's financial statement. (Pages 31 and 32 of transcript, Vol 2)

Q. I will show you a letter written by your company March 12th, 1928 to you and I ask you who wrote that letter?

Mr. Moore: I object to any letter written by his company to him as being self serving.

The Court: The objection is overruled and the letter will be admitted.

Mr. Moore: We object as being irrelevant and immaterial.

The Court: Objection overruled.

The letter, marked Exhibit "D", was received in evidence and is as follows:

Richfield Oil Co. of California

Los Angeles, California, March 12, 1928

Mr. L. D. Blodgett
District Manager
San Diego, Calif.

Mr. Gilbert Gordon
San Diego, Calif.

In the absence of Mr. Finlayson the writer is asking you to please accept this letter as your authority to secure an assignment from subject debtor of his interest in the Breon Service Station at Brawley, proceeds of same to be

(Testimony of Mr. Blodgett)
applied against his indebtedness on the San Diego account. Will you kindly have this assignment drawn, if possible, in such manner that it is for collection only, and will enable us to go back at Gordon for the amount of same in the event that we are unable to realize on his contract with Breon for any reason.

We note with interest your statements as to Mr. Lesser's purchase of the lot on which Gordon's station is located, and further your intention of consulting with this man shortly with the idea of further liquidating Gordon's indebtedness to us *throu* his assistance.

Your assurance of the ultimate collection in this instance has made us feel easier about the situation, and we certainly appreciate the efforts you are making to protect us on the balance outstanding.

May we ask that you also endeavor to obtain a schedule of liabilities in this case in order that we may know to whom this man is owing, and to what amounts. This will put us in position to consult with other large creditors with a view to coming to some mutual understanding to preclude possibility of others attaching the business. We have already consulted with Mr. Wheatley, India Rubber Mgr. for Southern California to this end. They will not press him.

J. A. Finlayson
Gen. Credit Manager (J. A. F.)

ALS.DC
CC El Centro
CC (Breon File)"

At the time this letter was written I had told Mr. Schwan about the conditions out there at Gordons. We

(Testimony of Mr. Blodgett)

had a verbal discussion about his assets having been reduced $17,000 from January 1st to April.

That on or about the 30th day of April, I received a letter from the India Tire & Rubber Company, enclosing a statement (original statement referred to, in evidence). This statement bore the endorsement: "This statement is sent you by request of C. A. Schwan. Signed The Office Manager." The statement is dated 4/30/28, and goes back to November 30, 1927, and on January 27th as an unpaid trade acceptance of $1464.00. An unpaid trade acceptance of March 13th of $317.05. An unpaid trade acceptance of March 27th of $2541.95, all of which was unpaid at the time the statement was made in April.

RE-CROSS EXAMINATION

By Mr. Moore.

At the time I received this letter I did not believe that Mr. Gordon was solvent because we knew that his trade acceptances had not been taken up at the bank. I told Mr. Schwan in March that we had some trade acceptances turned back.

EXAMINATION BY THE COURT

The reason why I say that Mr. Schwan knew the financial condition of Mr. Gordon is that he knew both from Gordon and from our credit department that Gordon's trade acceptances to us had been repudiated, one in January and one in February. It was a thing of some concern and we discussed it at some length at one time. Mr. Schwan was of the opinion that he and I, working together, would avoid a calamity in this matter. That was prior to April, and then we discussed it in La Jolla that time and some time in the early part of March, how it

(Testimony of Mr. Blodgett)

could be settled. Mr. Schwan and Mr. Swanholm of our company came to San Diego and together we discussed the situation pretty thoroughly because we were even trying to work out a plan whereby Mr. Lesser could be brought into breach with their guaranty, or with money, or with a lease on the property that would allow them to sell their equipment and stock, together with the lease, for a sufficient amount to take them out of the hole. We even went so far as to have Mr. Gordon talk to his brother-in-law in San Francisco for the purpose of enlisting his help. That was in the early part of March. We discussed it at some length to interest Mr. Lessar, even as late as the first of May, to put money into it to back Mr. Gordon up. In this letter I submitted three plans with the idea of financing things. That was prior to the meeting at La Jolla.

By the Court: As a matter of fact, did you hear or know that Mr. Gordon was insolvent on the 18th of April, 1928?

A. If he was insolvent on the day he into bankruptcy he was insolvent on the 18th of April.

Mr. Moore: I object on the ground that it is argumentative. I object to the question as it calls for a conclusion of the witness.

A. I would say that he was insolvent on the 18th of April, even if he made a statement that he had a net worth.

By the Court: Did you know from facts obtained that Mr. Gordon, prior to April, 1928, that he was insolvent, of your own knowledge?

(Testimony of Mr. Blodgett)

A. My opinion naturally would be that Mr. Gordon was insolvent.

The Court: I would ask you the reason why you arrive at that conclusion or idea?

A. Because he had a terrific amount of stock unpaid for; because he had an unreasonable amount of credit upon his books that in my judgment was not collectible; because in his statement he set up his lease as being worth some $6,000 or $7,000, when he did not have a lease; that the amount he stated his building was worth was far in excess of its worth. The only figures I entered into that statement in January were made in regard to his building, which he stated I had made too low. I would say that any statement he made was bad from that time to the time he went into bankruptcy. (P. 38-39 of Transcript Vol 2)

By the Court: Mr. Blodgett, can you state whether or not Mr. Gordon was able or not able to pay his obligations as they came due prior to March, 1928. A. He was not.

The Court: Do you know whether or not Mr. Schwan knew of that situation?

A. If I can refer to this statement, I would say that he knew.

The Court: Why do you bring that home to Mr. Schwan?

A. Mr. Schwan is the credit manager (Tran. p. 40)

From November 30th to the date the merchandise was taken it appears that the bankrupt paid the India Tire & Rubber Co. the following amounts: Dec. 8th—$15.20; Dec. 12th, cash $20.46; Dec. 19th, credit memorandum

(Testimony of R. W. Rawley)

$57.47; Jan. 4th, credit memo, $2.70; Jan. 16th, credit memo. $67.88; Feb. 14th, credit memo. $14.75; March 4th, credit memo. $7.20. The amount of the trade acceptances to the India Tire & Rubber Co. which was refused was $2,149.95. This was on March 27th.

That the time elapsing between the refusal of the payment of last trade acceptance and the removal of the tires by the India Tire and Rubber Company was from March 27th to April 18th. That the bankrupt, Mr. Gordon, was unable to pay his obligations as they came due prior to March, 1928. That from January until the filing of the petition, on various occasions I discussed with Mr. Schwan fully the financial condition of Gilbert Gordon.

R. W. RAWLEY,

witness for Claimant, examined by Mr. Moore, testified as follows:

I was formerly traveling auditor for the India Tire and Rubber Company and am now employed by Nelson Price Company who are exclusive distributors of the India Tires in Los Angeles. That the market value of the tires taken back from Mr. *Godon* at the time they were taken back would be from 25 to 40 per cent less than the prices on the credit memorandum. (Tr. vol. 2, p. 44). We gave him full credit. (Tr. vol. 2, p. 43)

Q. About this credit memorandum for merchandise taken back from Mr. Gordon there is a statement, "Taken to liquidate account"; can you explain what that means?

A. To liquidate account is a reason used by the India Tire and Rubber Company, to my knowledge, to balance an account. Just a requirement of the tire business.

(Testimony of H. B. Girard)

H. B. GIRARD,

a witness for claimant, examined by Mr. Moore testified as follows:

I am office manager of the India Tire and Rubber Company at Los Angeles. The paper I have is a ledger sheet covering the period from August 24th, 1927 to the present time. It shows the taking back of merchandise in the fall of 1927. The value of the merchandise taken back in the fall of 1927 I would estimate at about $3500 to $4000. That was old style stock.

[Endorsed]: No. 11544-M. In the District Court of the United States, for the Southern District of California, Southern Division. In the matter of Gilbert Gordon, Bankrupt. Stipulation and evidence received upon the trial. Filed Oct 29, 1929 at 35 min past 4 o'clock P. M. R. S. Zimmerman, Clerk, by F. W. Jones, Deputy. Minor Moore, C. V. Caldwell, 911 Stock Exchange Bldg., Attorneys for Appellant.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

In the Matter of	)	
	(	In Bankruptcy
GILBERT GORDON,	)	No. 11544-M
	(	PETITION FOR
Bankrupt.	)	APPEAL

*****

To the Honorable Paul J. McCormack, Judge of the United States District Court for the Southern District of California, Southern Division:

The India Tire and Rubber Company, your petitioner, conceiving itself aggrieved by the final order of this court entered on the 26th day of June, 1929, in the above entitled proceeding affirming the order of the referee in bankruptcy, by which order your petitioner's claim in the sum of $8539.71 against the estate of said bankrupt, was wholly disallowed, does hereby petition for an appeal from the said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that his appeal may be allowed and a citation granted directed to Carl O. Retsloff, trustee in bankruptcy, and commanding him to appear before the United States Circuit Court of Appeals for the Ninth Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in such proceeding duly authenticated may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

INDIA TIRE AND RUBBER COMPANY

By Minor Moore

Petitioner

Minor Moore
C. V. Caldwell,
Solicitors for Petitioner.

The foregoing appeal is hereby allowed.

Dated this 8th day of July, 1929

Paul J. McCormick

District Judge.

[Endorsed]: No. 11544-M. In the United States District Court, Southern District of California, Central Division. In the Matter of Gilbert Gordon, Bankrupt. Petition for Appeal. Filed Jul. 8, 1929 at 5 o'clock P. M. R. S. Zimmerman, Clerk, by B. B. Hansen, Deputy. Minor Moore, C. V. Caldwell, Stock Exchange Building, Los Angeles Calif., Trinity 4097, Solicitors for Petitioner.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

In the Matter of	)	
	(	In Bankruptcy No. 11544-M
GILBERT GORDON,	)	ASSIGNMENT OF
	(	ERRORS
Bankrupt.	)	

*****

Now comes India Tire and Rubber Company, a corporation, appellant herein, and files the following assignment of errors on appeal from the order of this court dated June 26th, 1929.

—I—

The United States District Court for the Southern District of California, Southern Division, erred in affirming the finding of the referee in bankruptcy wherein said referee found and determined that the bankrupt, Gilbert Gordon, was insolvent at the time of the transfer and delivery of the merchandise in question to appellant.

—II—

That the said District Court erred in affirming the finding of the referee in bankruptcy wherein said referee found and determined that the said India Tire and Rubber Company had reasonable cause to believe at the time of said transfer of merchandise, that a preference would be effected by reason of said transfer.

—III—

That the said District Court erred in affirming the finding of the referee in bankruptcy wherein said referee found and determined that at the time of said transfer of property to appellant, said appellant had reasonable cause to believe that the debtor was insolvent.

—IV—

The said District Court erred in failing to find and determine that there was not sufficient evidence to sustain the finding and decision of the referee wherein the said referee found and determined that the debtor, Gilbert Gordon, was insolvent at the time of the transfer of the property in question to the appellant, India Tire and Rubber Company, and that said India Tire and Rubber Company had reasonable cause to believe at the time of said transfer that a preference would be effected by reason thereof, and that said India Tire and Rubber Company had reasonable cause to believe at the time of said transfer that the said Gilbert Gordon was insolvent, there being no sufficient evidence to sustain said finding and decision.

—V—

The said District Court erred in failing to reverse the said decision of the referee on account of errors of the said referee, appearing in the record, in improperly receiving evidence which was duly objected to by appellant.

WHEREFORE, appellant prays that said order may be reversed.

INDIA TIRE AND RUBBER COMPANY,
a corporation, Appellant.
By Minor Moore
By C. V. Caldwell
Solicitors for Appellant.

[Endorsed]: No. 11544-M. In the United States District Court, Southern District of California, Southern Division. In the Matter of Gilbert Gordon Bankrupt. Assignment of Errors Filed Jul 9, 1929 at 3 o'clock P. M. R. S. Zimmerman, Clerk, B. B. Hansen, Deputy. Minor Moore, C. V. Caldwell 911 Stock Exchange Bldg. Tr. 4097. Attorneys for India Tire & Rubber Company.

IN THE DISTRICT COURT OF THE UNITED STATES FOR SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

In the Matter of	)	
	(	No. 11544-M.
GILBERT GORDON,	)	ORDER FIXING BOND
	(	FOR APPEAL.
Bankrupt.	)	

An order having been heretofore made allowing the India Tire & Rubber Company to appeal from the order of this court rejecting the claim of said Company, to the United States Circuit Court of Appeals, Ninth Circuit,

NOW, THEREFORE, upon the application of the said India Tire & Rubber Company, IT IS ORDERED that the bond on said appeal is hereby fixed in the sum of $500.00

DONE AND SIGNED on this the 10th day of July, A. D. 1929.

Paul J. McCormick

District Judge.

[Endorsed]: No. 11544-M In the District Court of the United States for the Southern District of California, Southern Division. In the Matter of Gilbert Gordon, Bankrupt. Order Fixing Bond for Appeal. Filed Jul 12 1929 at 45 min. past 9 o'clock A m R. S. Zimmerman, Clerk B. B. Hansen Deputy Minor Moore C. V. Caldwell 911 Stock Exchange Building, TR 4097 Attorneys for India Tire & Rubber Company.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

In the Matter of	)	
	(	
GILBERT GORDON,	)	In Bankruptcy No. 11544-M
	(	BOND ON APPEAL
Bankrupt.	)	

****

KNOW ALL MEN BY THESE PRESENTS:

That we, India Tire and Rubber Company, a corporation, as principal, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, as surety, are held and firmly bound unto Carl O. Retsloff, Trustee in Bankruptcy of the estate of Gilbert Gordon, bankrupt, in the sum of $500.00, for the payment of which well and truly to be made we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of July, 1929.

Whereas, the above named India Tire and Rubber Company has prosecuted or is about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the final order in the above entitled proceeding entered in the office of the Clerk of the United States District Court of the Southern District of California, Southern Division, on the 26th day of June, 1929.

Now, therefore, the condition of this obligation is such that if the above named India Tire and Rubber Company, a corporation, shall prosecute its appeal to effect, and answer all damages and costs if it fails to make said ap-

peal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

INDIA TIRE AND RUBBER COMPANY
By Minor Moore, attorney
Principal

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA (SEAL)
By C. F. Batchelder
Attorney-in-fact Surety.

The foregoing bond approved
Wm. P. James
United States District Judge.

STATE OF CALIFORNIA,)
County of Los Angeles) ss.

On this 12 day of July in the year one thousand nine hundred and Twenty-Nine, before me F. D. Lanctot, a Notary Public in and for the County of Los Angeles personally appeared C. F. Batchelder known to me to be the person whose name [Seal] is subscribed to the within instrument as the Attorney-in-fact of the INDEMNITY INSURANCE CO. OF NORTH AMERICA, and acknowledged to me that he subscribed the name of the Indemnity Insurance Co. of North America thereto as principal, and his own name, as Attorney-in-fact.

F. D. Lanctot
Notary public in and for the county of Los Angeles State of California

[Endorsed]: 11544-M Mines & MacKeigan & Anderson, Inc. 639 South Spring Street Los Angeles, California VAndike 2890 Bond Filed Jul 13 1929 at 50 min. past 9 o'clock A m R. S. Zimmerman, Clerk B. B. Hansen Deputy Indemnity Insurance Company of North America Philadelphia

IN THE UNITED STATES CIRCUIT COURT OF APPEALS NINTH CIRCUIT

In the Matter of	)	
	)	STIPULATION AS TO
GILBERT GORDON,	)	RECORD ON APPEAL
	)	
Bankrupt.	)	

- - - - -

WHEREAS, in the above entitled proceeding the India Tire and Rubber Company, a corporation, did on the 9th day of July, 1929, duly file in the District Court of the United States for the Southern District of California, Southern Division, a petition for appeal, a citation and assignment of errors, which said appeal was allowed by order of the District Court upon said day, and the time to certify the record herein having been duly extended to the 15 day of September, 1929,

NOW, THEREFORE, it is hereby stipulated that the record to be certified to this court by the Clerk of the United States District Court for the Southern District of California, Southern Division, on said appeal shall consist of the following:

1. Claim of India Tire and Rubber Company against the estate of the bankrupt;
2. Objections to said claim by the trustee;
3. Order of referee disallowing claim;
4. Exceptions to decision of the referee;
5. Petition for revision of referee's decision;
6. Order of District Court affirming referee's decision;
7. Petition for appeal;
8. Citation;
9. Assignment of errors;
10. Statement of testimony

11. All documents offered in evidence, together with the original petition in bankruptcy and schedules thereof, or such part as may be necessary.

Dated this 9th day of July, 1929.

Minor Moore
C. V. Caldwell
Attorneys for Appellant.
Tompkins and Clark
Will M. Tompkins
Attorney for Respondent

[Endorsed]: In the United States Circuit Court of Appeals, Ninth Circuit. In the Matter of Gilbert Gordon, Bankrupt. Stipulation as to Record on Appeal, and Stipulation Extending Time to Certify Record on Appeal. Filed July 19 1929 3 P. M. R. S. Zimmerman, Clerk By B. B. Hansen Deputy Clerk Minor Moore C. V. Caldwell 911 Stock Exchange Building. Attorneys for India Tire & R. Co.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

In the Matter of	
GILBERT GORDON,	Bankruptcy No. 11544 M
Bankrupt	PRAECIPE

To the Clerk of the United States District Court:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the

Ninth Circuit pursuant to an appeal allowed in the above entitled proceeding, and to include in such transcript the following:

1. Claim of India Tire & Rubber Company against the estate of the bankrupt.
2. Objections to said claim by the trustee.
3. Order of Referee disallowing claim.
4. Exception to decision of the Referee.
5. Petition for revision of Referee's decision.
6. Order of the District Court affirming Referee's decision.
7. Petition for Appeal.
8. Citation.
9. Assignment of errors.
10. Statement of testimony, in narrative form, including exhibits set out in said statement.
11. Stipulation as to record on appeal.
12. Praecipe.

Dated October 29, 1929.

Minor Moore
C. V. Caldwell
Attorneys for Appellant.

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } SS.

Gladys A. Elliott, being first duly sworn, deposes and says: That she is a citizen of the United States and above the age of eighteen years; that heretofore, on the 29th day of October, 1929 she served the within Praecipe by enclosing a copy of the same in a sealed wrapper and addressed the same to Tompkins & Clark, Spreckels Theater Building, San Diego, and after having prepaid the

postage on same, deposited same in the postoffice at Los Angeles, California.

That there is a daily exchange of mail by the United States Postal Department between the City of San Diego and the City of Los Angeles.

Gladys A. Elliott.

Subscribed and sworn to before me this 29 day of October, 1929.

[Seal] C. V. Caldwell

Notary Public in and for Los Angeles County, California.

[Endorsed]: No. 11544-M. In the District Court of the United States, for the Southern District of California, Southern Division. In the Matter of Gilbert Gordan Bankrupt. Praecipe Filed Oct 29, 1929 at 10 min past 4 o'clock P. M. R. S. Zimmerman, Clerk, F. W. Jones, Deputy. Minor Moore. C. V. Caldwell 911 Stock Exchange Building Los Angeles California Attorneys for Appellant.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

In the Matter of	)	
	(	In Bankruptcy No. 11544-M
GILBERT GORDON,	)	CLERK'S
	(	CERTIFICATE.
Bankrupt.	)	

*****

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 53 pages, numbered from 1 to 53 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; claim of India Tire & Rubber Company against estate of the bankrupt; objections to proof of debt; order sustaining objections of trustee; exception to decision of the referee; petition for revision; order affirming decision; statement of testimony; petition for appeal; assignment of errors; order fixing bond on appeal; bond on appeal; stipulation as to record on appeal and praecipe.

I DO FURTHER CERTIFY the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to.....and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this..... day of November, in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, and of our Independence the One Hundred and Fifty-fifth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 5980

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHWESTERN STEVEDORING COMPANY, a corporation, and OCCIDENTAL INDEMNITY COMPANY, a corporation,

Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act and MARTIN MATHESON,

Appellees.

Upon appeal from the United States District Court for the Western District of Washington, Southern Division

Brief of Appellants

LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,
Attorneys for Appellants.

Office and Post Office Adress:
611-23 Central Bldg.,
Seattle, Wash.

THE IVY PRESS, SEATTLE

No. 5980

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SUBJECT INDEX

SUBJECT INDEX (*Continued*)

No. 5980

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Appellees.

Upon appeal from the United States District Court for the Western District of Washington, Southern Division

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Brief of Appellants

STATEMENT OF THE CASE.

The appellants filed in the District Court a bill of complaint seeking to suspend and set aside an award of compensation in favor of appellee, Martin

Matheson, under the Longshoremen's and Harbor Workers' Compensation Act. This is an appeal from the order of the District Court denying appellants' motion for and interlocutory injunction staying payment of the amount required by the award pending final decision in the District Court.

On October 18, 1928, the appellee, Martin Matheson, was employed by the appellant, Northwestern Stevedoring Company, as a longshoreman on board a vessel at Tacoma, Washington, and sustained an injury when stepping between some loose dunnage and a hatch coaming (Tr. 39). The appellant, Occidental Indemnity Company, is the insurance carrier provided in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Thereafter an award was made by the appellee, Wm. A. Marshall, Deputy Commissioner for the Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Act (Tr. 38-40). It was to review this award that this action was instituted by the appellants.

ASSIGNMENT OF ERRORS.

The following errors were set out in the assignment of errors, and are relied upon by the appellant:

That the United States District Court for the Western District of Washington, Southern Division, erred in entering said order denying complainants' motion for an interlocutory injunction, on the ground and for the reason that it appears from the record herein that the defendant, Martin Matheson, is insolvent, and that, therefore, any payments made under the award pending the decision herein, if eventually favorable to the complainants, could not be recovered, and irreparable damage would result to the complainants, and because said order is contrary to law (Tr. 54-55).

ARGUMENT.

Section 21 of the Longshoremen's and Harbor Workers' Compensation Act, being Title 33, U. S. C. Sec. 921, provides in part as follows:

> "(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the Deputy Commissioner making the order, and instituted in the Federal District Court for the judicial district in which the injury occurred * * * * * *
> "The payment of the amounts required by an award shall not be stayed pending fiinal decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, * * * allows the stay of such

payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. * * * ''

It is pursuant to this section that appellants filed their bill of complaint (Tr. 2) and presented their motion for an interlocutory injunction (Tr. 42). A hearing was had on the motion, resulting in the court's filing a memorandum decision (Tr. 45) and entering an order (Tr. 51) denying the motion from which this appeal is taken.

The undisputed testimony on the hearing of the motion was that the appellee, Martin Matheson, was insolvent, and if an interlocutory injunction were not issued staying the payment of the amount required to be paid by the award of compensation, such payments would have to be made, and, if the appellants were successful in their action, said payments could not be recovered from the appellee, Martin Matheson, and the appellants would lose the benefit of any favorable decision received (Tr. 43, 56).

The court in its memorandum decision found that the appellee, Martin Matheson, was insolvent, stating that this fact was not disputed and continuing, says:

"It follows that denial of the stay, pending final determination, would irreparably injure the complainants if the injured defendant should be found, upon final decree, not entitled to any part of the amount awarded him." (Tr. 49).

This conclusion of the court is amply sustained by the following authorities:

Indian River Steamboat Co. vs. East Coast Transportation Co., 10 So. 480, 487; 28 Fla. 387; 29 Am. St. Rep. 258,

Gause vs. Perkins, 56 N. C. 177, 179; 69 Am. Dec. 728,

Deegan vs. Neville, 29 So. 173, 175; 127 Ala. 471; 85 Am. St. Rep. 137,

Kerlin vs. West, 4 N. J. Eq. (3 H. W. Green) 449,

4 Words & Phrases, 3773,

Cleveland vs. Martin, 75 N. E. 772, 777; 218 Ill. 73; 3 L. R. A. (N. S.) 629,

Devon vs. Pence (Ky.) 106 S. W. 874, 875,

32 C. J. 64.

As far as appellants are advised, appellees do not dispute the conclusion of the court on this proposition.

Insolvency Having Been Shown Appellants Were Entitled to Have Their Motion Granted As a Matter of Course.

In view of the fact that the proceedings instituted in the District Court are in the nature of an appeal, it follows that, if the statute granting the appeal provides therefor, the award of the Deputy Commissioner should be stayed pending a determination of the appeal. Section 21 of the Act, as set forth above, directly provides that the award shall be stayed where irreparable damage would otherwise ensue; and, therefore, upon insolvency being shown, the stay should have followed as a matter of course. Without such relief, there is no appeal. The District Court, although refusing in this case to stay the award pending final decision by the District Court, has permitted the filing of a supersedeas bond on the appeal to this court staying all further proceedings (Tr. 64). It was, of course, apparent to the District Court that if such supersedeas were not allowed, an appeal to this Court would in effect be denied, for, long before this case to stay the award pending final decision by under the award would have been made. This is likewise true in so far as the hearing of this matter in the District Court is concerned, and it is appel-

lants' contention that the District Court's refusal to stay the award pending final decision in the District Court was likewise a deprivation of appellants' undoubted right of appeal.

The District Court, while apparently recognizing the force of this contention, did not limit its consideration of the motion to the evidence in support thereof, namely, the insolvency of the appellee, Martin Matheson, but proceeded to consider the merits of the bill of complaint, although the only matter before the court at the time was the appellants' motion for an interlocutory injunction.

The court correctly stated appellants' contention on the merits as follows:

> "It is the contention of the complainants that the finding by the Deputy Commissioner of a 40% disability is unsupported by the evidence; that the evidence shows the existence of an arthritic condition existing before the injury which arthritis was a partial disability; that while the evidence shows the injury aggravated the arthritis, and resulted in an increased degree of disability, that there is no evidence that such increase exceeds 15% of the disability that would have been sustained by the loss of the leg." (Tr. 49).

The court then erroneously proceeds to dispose, not only of the motion, but in effect of the entire cause on its merits, stating as follows:

"If there is no evidence that the disability exceeds 15%, before this case would probably be tried and determined there would have been paid under the award an amount greater than properly allowable. Therefore, it will be assumed, with that fact made certain that complainants would sustain irreparable injury from a denial of the stay but the Court is unable to find that such fact is made reasonably certain."

"The only evidence as to the relative amount of disability to be attributed to the arthritis before the injury as distinguished from the arthritis as aggravated by the injury, expressed in percentages, is the opinion evidence of doctors and surgeons.

* * * * * * * * * *

"The Court is unable to say that in finding that claimant had suffered a 40% disability from the injury the Deputy Commissioner acted without evidence." (Tr. 49-51).

In thus proceeding appellants contend that the court erred in three respects:

First. That the merits of the case were not before the court and should not have been considered.

Second. That the appellants are entitled to a hearing *de novo* before the District Court and therefore the evidence upon which the court's final decision must be based was not before it.

Third. That if appellants are limited to a hearing before the District Court upon the tes-

timony received by the Deputy Commissioner, that the court erred in finding that the award was supported by that testimony.

These three points will be discussed in order.

First: The hearing before the court was upon appellants' motion; no testimony was offered by appellants on the merits, nor could any testimony going to the merits have been properly introduced at that time. The sole question presented was the right of appellants to a stay (in effect a supersedeas), under the provisions of Section 21 of the Act above set out. Insolvency having been shown, it follows that the motion should have been granted and the merits considered in the regular course with full opportunity to the appellants to present such facts or arguments as they deemed necessary.

Second: Appellants contend that they are entitled to a hearing *de novo* before the District Court. That such is the law was decided by the District Court for the Southern District of Alabama, Southern Division on May 27, 1929, in a decision by Ervin, D. J., in the case of *Benson vs. Crowell,* reported in 33 Fed. 2nd. 137. The substance of this decision is that, unless a hearing *de novo* before the District Court is contemplated by the Longshoremen's and

Harbor Workers' Compensation Act, that Act would be in violation of the following provisions of the Federal Constitution, namely:

Section 2, Article 3 which reads:

> "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

The Fifth Amendment to the Constitution which provides that no person shall be "deprived of life, liberty, or prosperity, without due process of law."

The court proceeds in this decision to demonstrate that the act itself contains provision for such a hearing *de novo*. A few quotations from this exhaustive decision will be sufficient:

> THE COURT: "I think everyone will concede that the proceeding before the deputy commissioner was not a judicial proceeding, but was a mere statutory proceeding by an administrative officer directed and controlled by the Longshoremen's Act. * * *
>
> "The question therefore arises whether or not the act under discussion undertakes to deprive the federal courts of judicial power conferred upon them by the Constitution.
>
> "The answer to this question depends * * * upon the conclusions reached as to the due process clause, and I shall therefore now discuss that. * * *

"In the instant case, where the employee is seeking to hold the employer liable for an injury suffered by the employee in the performance of his duty, there certainly never was any summary or ministerial proceedings recognized either by the common law in England, or by the practice in this country, which permitted a liability to be fastened upon the employer, and his property be subjected to this demand, until after a judicial trial of the rights and questions involved. * * *

"I think no one would be so hardy as to contend that the proceedings provided for in this Compensation Act was a judicial determination of the rights of an employee as against the employer, and, unless there is to be found in the act, either by appeal, injunction or otherwise, the right of the parties to have the liability determined by judicial process and hearing, then the act is unconstitutional.

"It has been urged upon me, as undoubtedly it was upon the other judges who had this act before them, that the court is limited by the act, in its hearing on the injunction, to the question whether or not there was any evidence offered before the deputy commissioner on which he could have found liability, and that the court, under the terms of the act, cannot have a hearing *de novo* and pass upon the merits of the case, but is limited to the question whether or not the commissioner on the evidence before him could have found liability.

"If this be true, then it seems to me necessarily the act was beyond the power of Congress, and is void.

"In *Ohio Valley Water Co. vs. Ben Avon Borough,* 253 U. S. 238, 40 S. Ct. 527, 64 L. Ed.

908, a case in which under a Pennsylvania statute a valuation of a water works concern by a Public Service Commission of Pennsylvania was made for the purpose of determining a fair rate to be charged by the water company, Mr. Justice McReynolds, writing for the court, on page 289 (40 S. Ct. 528) says:

'Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal.

'The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. *Prentis vs. Atlantic Coast Line Co.,* 211 U. S. 210 (29 S. Ct. 67, 53 L. Ed. 150); *Lake Erie & Western R. R. Co. vs. State Public Utilities Commission,* 249 U. S. 422, 424 (39 S. Ct. 345 [63 L. Ed. 684]). In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment.'

"The Fourteenth Amendment applies to the states, while the Fifth applies to the federal government.

"I can see no distinction between valuing the property of a waterworks plant for rate-making purposes, by a commission, and the determination by a deputy commissioner that an employer is liable to an employee for a given

sum because of an injury suffered while in the employment. In the one case, the waterworks plant is denied a proper return upon its investment, so its property is taken without due process of law, while in the other the property of the employer is subjected to execution and sale to pay the award made by the deputy commissioner, and so his property is taken without due process of law. In fact, the latter is the more direct loss, for, while one is denied the right to make a profit, the other is deprived of property already earned.

"Certainly proceedings by a commissioner under this act is not more due process than was the hearing by the Public Service Commission in fixing the rates. In neither instance was there a judicial hearing and determination of the rights of the respective parties. If anything, there is less due process as against an employer of labor because it is common knowledge that he was in no sense carrying on a public function but was conducting a private business.

"Can the provisions of the act in question be treated in any way as giving to the admiralty court the power to hear and determine the facts as well as the law? In section 18 of the Compensation Act it is provided that, in case of default by the employer of the payment of the award within 30 days, the deputy commissioner may have an investigation and determine the amount of the default, and that this determination may be filed in the federal District Court, and it then said: 'such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of a copy enter judgment for the amount declared in default by the supplementary order if such supplementary

order is in accordance with law. *Review of the judgment so entered may be had as in civil suits for damages at common law.'* (Italics mine.)

"Now, what judgment was it that might be reviewed as in civil suits for damages at common law? Was it the judgment of the deputy commissioner or was it the judgment of the District Court? Apparently it was the judgment of the District Court, for the provision was that such supplementary order of the deputy commissioner shall be final, and the court shall enter judgment for the amount declared in default. The only judgment referred to apparently was the judgment of the court. If the judgment of the court, however, was to be reviewed, what error could be found by any other court if the court was required by the act to enter judgment in the amount found by the deputy commissioner?

"Did Congress intend to require the court to enter its order merely on the finding of the deputy commissioner, and to make that order final. Was the court to make its order without any hearing of the facts, to submit its judgment to the domination of the deputy commissioner because the act said do it? If so, would not this of itself be an unconstitutional requirement? How can the Congress require a court to enter a judgment as between private citizens without a hearing of the facts by the court?

"However, we find that the court was to enter judgment for the amount declared in default by the supplementary order, 'If such supplementary order is in accordance with law,' so apparently by the very terms of the act the court was required to investigate the findings of the deputy commissioner to see if they were

in accordance with law. It therefore appears likely that it was the judgment of the deputy commissioner which was to be reviewed.

"Subdivision (b) of Section 21 says: 'If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings.'

"That is the same term used in section 18, namely, 'Is in accordance with law.' What did the Congress mean by these words? Surely they did not mean to limit the court in considering the order of the commissioner to the determination that there was no evidence considered by him which would authorize a decree. If on the hearing before the commissioner the evidence did not justify a compensation order by him, then his order would not be in accordance with law. Again, if the evidence offered before the court on the application for an injunction, on the hearing on such application, showed that the award should not be made, then surely the award would not be in accordance with law, because, to be in accordance with law, the facts of the case should justify the award. Again, it is said the 'order may be suspended or set aside, in whole or in part.' Now, if the court is to set it aside in whole or in part, does that not indicate an intention that the court was to have all the facts before it, for, if the court was not confined in its determination to the question, whether the award as a whole was in accordance with law, it must be that Congress intended the court to do complete justice, and to do this the court must have all the facts before it. Again, it will be noticed that there is no provision or requirement for remanding the case to the deputy commissioner. If the court is to set it aside in whole or in part, the court is to write

the final judgment, and, if so, it should be only after hearing all the facts.

"I cannot conceive that Congress ever meant to deprive the employer of labor of the right to a fair judicial hearing before providing that his property might be subjected to the payment of any demands, and therefore I am inclined to treat these provisions found in the act as authorizing the court to go into the real facts and grant a hearing *de novo,* for it is only by so construing the act that I can hold it to be constitutional."

In view of this decision, we submit that the court erred in denying appellants' motion and predetermining the merits of appellants' case prior to full and complete hearing on the merits.

THIRD: If this court is of the opinion that the District Court is limited to a review based solely on the testimony before the Deputy Commissioner, we nevertheless submit, in addition to what has been set forth under "FIRST," that the court erred in finding that the award was supported by that testimony. A transcript of that testimony with the award is appended to the bill of complaint as exhibits (Tr. 6-37; Tr. 38).

It is contended that, under the law that the commissioner's finding should segregate the percentages of disability attributable to the accident and to the

pre-existing arthritis, and that the award should be made only for the former.

The purpose of the Longshoremen's and Harbor Workers' Compensation Act is clearly to place the economic burden for disability resulting from an injury upon the industry and to make the award, regardless of liability upon the part of the employer. In other words, its purpose is to make the industry pay the losses occurring to employees in the course of their employment and resulting therefrom. Congress has recognized that injuries to employees should be assumed as a burden of the industry in like manner as the wearing out of the physical equipment used therein, and whereas when a new or used part of the physical equipment of an industry is destroyed it is replaced and the cost thereof borne by the industry, so should the injury to an employee be so borne by the industry.

Section 8 of the Act being Title 33 U. S. C. Sec. 908, provides as follows:

> "(22) (f) Injury increasing disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: * * * .

> (2) In all other cases in which, following a previous disability, an employee receives an injury which is not covered by (1) of this sub-division, the employer shall provide compensation only for the disability caused by the subsequent injury. In determining compensation for the subsequent injury * * * the average weekly wages shall be such sum as will reasonably represent the earning capacity of the employee at the time of the subsequent injury."

The case at bar is covered by sub-division (2), as there is not here a case of permanent total disability. Both sub-divisions (1) and (2) provide that the employer shall pay compensation only for the disability caused by the subsequent injury, that is to say, only for the injury for which the industry itself is responsible. The industry is responsible for only the direct result of the injury and not for the result which is a combination of the injury and some pre-existing condition of the employee, for, to hold otherwise, would be to place an undue burden on the industry not contemplated by the provisions of the Act.

The Act was patterned after the Workmen's Compensation Law of New York, and in the case of *Texas Employers' Ins. Ass'n, et al., vs. Sheppeard,* 32 Fed. 2nd 300, decided in the District Court of the United States for the Southern District of Texas on April 12, 1929, it was held by the court as follows:

> " * * * it is a fundamental rule of statutory construction that the adoption of a statute of another state which has been construed in the courts of that state carries that judicial construction with it in the adopting state."

The New York Act, Section 15, Sub-division 6, now Sub-division 7, originally read as follows:

> "Previous disability. The fact that an employee has suffered previous disability or received compensation therefore shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earnings capacity at the time of the later injury."

By amendment in 1915, the following provision was added:

> "Provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability."

Since said amendment, the courts of New York State have segregated disabilities resulting from accident from pre-existing disabilities and compensated only for the disabilities resulting from the accident.

See

Ladd vs. Foster Brothers Manufacturing Co., 200 N. Y. Supp. 258;

Lewis vs. Lincoln Engineering Corporation, 210 N. Y. Supp. 481;

Przekop vs. Ramapo Ajax Corporation, 212 N. Y. Supp. 426;

DiCarlo vs. Elmwood Construction Company, 214 App. Div. 857;

Klock vs. Rogers, 209 N. Y. Supp. 667;

Blaes vs. E. N. Bliss Co., 163 N. Y. Supp. 722.

The wording of the New York law, as well as of the Act in question, clearly contemplates that pre-existing disabilities should not be included in the compensation granted, and that the industry should bear only the burdens directly resulting from the injury and not those resulting from the pre-existing condition of the employee.

An inspection of the award (Tr. 38-40) discloses that no mention was made by the Deputy Commissioner of the previous existing condition of arthritis and no segregation of disability made as required by sub-division 22 (f) and particularly that portion thereof reading as follows:

> " * * * the employer shall provide compensation only for the disability caused by the subsequent injury."

A brief summary of the testimony will be given to demonstrate the error committed.

Dr. R. C. Schaeffer called as a witness on behalf of the appellants, testified as follows:

> I examined (Martin Matheson) on December 6, 1928. His injury was on October 18th. That was about six weeks after the injury. He is a man sixty years old. Teeth very bad. Pyorrhea and infection of mouth. He walks normally and without a limp, although he is somewhat knock-kneed on the right side. The right knee shows no swelling and no external evidence of injury. He complains of marked tenderness at the attachment of the external lateral ligament into the head of the tibia. He states that all his pain is at this point. Pressure at this point causes pain.
>
> An X-ray examination shows a lessening of the articular space in the outer portion of the right knee-joint. There is some change in the external semilunar cartilage. A stereoscopic X-ray of this knee made by Dr. R. D. MacRae. roetenologist, shows a beginning calcification of the external semilunar cartilage. There is a spur on the outer aspect of the head of the right fibula. There is exostotic growth at the attachment of the patellar ligament to the tibial tubercle. IN OTHER WORDS, THAT WAS EVIDENCE OF A CHRONIC ARTICULAR RHEUMATISM (Tr. 11-12).
>
> ' An injury may precipitate arthritis in a joint, but in this particular case our X-rays were taken about six weeks after the accident and very advanced bony changes were found. THEY COULD NOT HAVE TAKEN PLACE

WITHIN THE SIX WEEKS FROM THE TIME THAT THE INJURY WAS RECEIVED. These were calcified changes. They were bony formations and some of those bony formations—one of those is right at the insertion of the patellar tendon—at a place where there was no soreness whatever (Tr. 12). THE ARTHRITIC CONDITION WAS SUFFICIENTLY ADVANCED TO INDICATE A PROGNOSIS OF PERMANENT DISABILITY. THE DISABILITY OF THAT KNEE AT THE TIME THAT I EXAMINED IT WAS PROBABLY ABOUT TEN PER CENT THAT INCLUDES ARTHRITIS AND EVERYTHING ELSE. THE DISABILITY WAS UNQUESTIONABLY ATTRIBUTABLE TO THIS ARTHRITIS WHICH WAS INDICATED BY THE BONY CHANGES. HE HAS BONY OUTGROWTHS ON THAT KNEE THAT INDICATE A PAST TROUBLE AND A PREVIOUS FOOT TROUBLE. He has such an extensive calcification of the external semilunar cartilage that it has made him knock-kneed. It has thrown his knee in and his foot out. He is going to get a flat foot eventually. THAT CONDITION EXISTED AT THE TIME OF THE INJURY. (Tr. 14). 14).

Dr. A. B. Heaton, called as a witness on behalf of the appellants, testified as follows:

The X-ray shows that the semilunar cartilage was flattened—thin—and showed calcification changes, and also calcification changes on the ends of the tibia. By calcification I mean enlarged bony growths. There is calcification on both the external and semilunar cartilage. THESE BONY CHANGES AND THE CAL-

CIFICATION OF THESE CARTILAGES WERE THERE PREVIOUS TO THE INJURY (Tr. 18). They were more or less extensive throughout the knee-joint. THOSE ARE ARTHRITIC CHANGES, PROBABLY FROM LONG-STANDING INFECTION. His teeth are quite bad and his gums are quite infected (Tr. 19). MR. MATHESON'S DISABILITY IS A COMBINATION OF BOTH THE PREVIOUS CONDITION AND THE INJURY (Tr. 20). The percentage of the disability of that knee at the present time, considering the full function of the knee at 100%, is 30 or 40 per cent. I wouldn't say that it was mostly attributable to the injury (Tr. 21). I have noticed that he has always walked kind of knock-kneed (Tr. 22) during the last seven or eight years. He now has 100 per cent of the leg for a little while, but it does not last, and I come to my conclusion as to disability based upon how long it takes him to play out (Tr. 23).

Dr. H. T. Buckner, called as a witness on behalf of the appellants, testified as follows:

My examination disclosed the following:

Teeth show marked pyorrhea. Throat red and infected. Both legs are the same length. There are many varicose veins of both legs with marked brownish discoloration which usually accompanies such conditions. Has marked flattening of both feet, both longitudinal and transverse arches. There is also some pronation of both feet. Right knee: There is a slight knock-knee tendency with some slight limitation in flexion and extension. There is a slight lateral instability (Tr. 27). The X-ray showed no evidence of any fracture. He had a marked

lipping, indicative of an osteo-arthritis. The injury sustained is what is commonly known as sprain of the knee.

"Q. What would you estimate the extent of Mr. Matheson's permanent partial disability, relating this disability to the right knee-joint, and considering the normal function of that knee-joint as 100 per cent, what would you consider to be Mr. Matheson's permanent partial disability directly resulting from this accident?

A. Well, I would estimate his relaxation of the knee to be about ten per cent—that is, of the internal lateral ligament.

Q. If the bony changes which you found so marked in Mr. Matheson's knee from the X-rays had never been affected by the injury, was the condition sufficiently progressive so that it would in your opinion ultimately disable him?

A. Yes, it would.

Q. If there had been no arthritis present in this knee, was there any finding to indicate any circumstances resulting from the injury (Tr. 28) which would keep him from recovering as the normal sprain of a knee would recover?

A. No, if he did not have any arthritis in his knee I should think that he would make an ordinary recovery. He might have some relation of the lateral ligament." (Tr. 29).

He is a man past sixty-three. His period of doing hard work is past. Bony changes normally appear in the bone in and about the joints. He has a degree of focal infection, of marked pyorrhea and a red and infected throat, which is an indication of infection and arthritic bony changes of that type are more or less a progressive disease, anyway (Tr. 29).

> He has no more than 15% or 20 per cent at the very maximum of the disability of the knee even with the arthritic condition (Tr. 30).

Dr. Roger Anderson called as a witness on behalf of the appellee, testified as follows:

> I found there was a hyperthropic osteoarthritis and that the injury had aggravated his pre-existing arthritis (Tr. 31). From examination made on April 12, 1929, it is my opinion that there was at least 35 to 45 per cent of disability in regard to the function of his right leg, taken as a whole, for his heavy previous duty of longshoring, both as a result—that is, the disability is both the result of his existing arthritis and of his injury (Tr. 32).
>
> IN MY OPINION, THERE WILL BE A 15% PERMANENT PARTIAL DISABILITY OF THE FUNCTIONS OF THE RIGHT KNEE (Tr. 34) AS A RESULT OF THE ACCIDENT (Tr. 35). THE STATEMENT THAT I MADE TODAY, COVERS BOTH THE RESULT OF THE ACCIDENT AND OF THE DISEASE (Tr. 34).

From the foregoing testimony it appears, without dispute, that there was a pre-existing condition of arthritis. The appellants therefore submit that, based only on the testimony received by the Deputy Commissioner, the view of the trial court was erroneous both on the facts and the law. The award has charged the employer with the loss sustained by the employee resulting from both his previous con-

dition of arthritis and the injury, whereas under the Act it is clearly contemplated that the employer shall pay only that proportion of the injury attributable to the accident.

Appellants respectfully submit that the Order of the District Court should be reversed.

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CASSIUS E. GATES,
EDWARD G. DOBRIN,

Attorneys for Appellants.

No. 5981.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
GILBERT S. GORDON,
Bankrupt.

India Tire & Rubber Company,
Appellant,
vs.
Carl O. Retsloff, Trustee in Bankruptcy of Gilbert S. Gordon, Bankrupt,
Appellee.

APPELLANT'S BRIEF AND ARGUMENT ON APPEAL.

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TABLE OF CASES AND AUTHORITIES CITED.

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APPELLANT'S BRIEF AND ARGUMENT ON APPEAL.

STATEMENT OF FACTS.

Gilbert Gordon was adjudicated a bankrupt on the 18th day of June, 1928, and Carl O. Retsloff duly appointed trustee. A claim against the estate of said bankrupt in the sum of $9,038.54 was filed by appellant. This claim was disallowed on the ground that the appellant had received a preference. The objection and order sustaining the objection to said claim appear at pages 5 and 6 of the transcript of record herein.

At the hearing had before the Referee upon the trustee's objections to appellant's claim, the testimony was reduced to writing, and upon the Referee's order sustaining the objections to the allowance of said claim, appellant demanded a review by the District Court and upon the same testimony the District Court made an order affirming the decision of the Referee. [Tr. of Rec. pp. 10 and 11.] From the order of the District Court so made this appeal is taken.

The testimony shows that the bankrupt, Gilbert Gordon, was engaged in the business of selling automobile tires at San Diego, California, and had been so engaged for some years prior to 1928 and during all such time had been handling merchandise sold to him by the appellant; that on the 18th day of April, 1928, the appellant caused a quantity of tires, which had been sold to the bankrupt by the appellant, to be reclaimed and returned from the bankrupt's place of business to appellant's warehouse at Los Angeles and credit for the tires so taken was given said bankrupt in the same amount as had been charged for said merchandise when it was sold to the bankrupt a few months previous thereto. It is this transaction of April 18th, 1928, which appellee contends constituted a preference and justified the disallowance of appellant's claim.

ARGUMENT.

In order to justify the decision of the Referee sustaining the objection to the allowance of appellant's claim it must appear:

1st—That the debtor was insolvent at the time of the transaction in question;

2nd—That the appellant had reasonable cause to believe that the transaction would effect a preference.

57-G, 60-B, Bankruptcy Act.

Assignment of Error Number One. [Tr. of Rec. p. 45.]

INSOLVENCY.

There was no competent evidence before the court justifying the finding that the bankrupt was insolvent on April 18th, 1928. Such evidence as there was before the court tended only to prove that the bankrupt was in financial difficulties and was not in all cases paying his bills as they became due. The only direct evidence of insolvency was the testimony of the witness Blodgett, who testified as a conclusion that he believed the bankrupt to be insolvent on the date in question. [Tr. of Rec. pp. 26, 40, 41.] As to the testimony of the witness just referred to, we call attention to the fact that this testimony was objected to and that the witness was permitted to testify as above indicated over objection by appellant; that this testimony was improper is apparent on the face of the record. Insolvency must be proved in the same manner as any other fact. To this effect the rule stated in Remington on Bankruptcy, section 1765, is as follows:

> "In general, the ordinary rules of evidence are to govern in the proof of insolvency."

Opinion evidence is properly received to prove insolvency, but the opinion of the witness must relate to the value of the property and not to the ultimate and precise question before the court for decision. One may as well be permitted to ask a witness in a personal injury case whether in his opinion the defendant was negligent, as to

permit a witness to give an opinion as to whether or not a debtor is solvent when that is the precise issue to be determined. Where assets consist in part of accounts receivable, a witness who has shown himself qualified may give his opinion as to the value of certain or of all the accounts, as was done in Doyle-Kidd Dry Goods Co. v. Trading Co., 206 Fed. 813.

But there is no rule which permits a witness to give an opinion as to whether a person is or is not solvent.

Summary of Evidence Bearing on Solvency.

We summarize all of the evidence in the record bearing upon the question of solvency as follows:

(a) The witness Retsloff testified [Tr. of Rec. pp. 18-19] that Mr. Schwan (who was credit manager of the India Tire & Rubber Co. at the time of the transaction in question but who died prior to the hearing before the Referee) stated to him that he knew that Mr. Gordon "was broke" and that he took the tires out for the reason that he knew Mr. Gordon probably would not get out of bed again as he was very sick at that time. This conversation took place on the 10th day of July, 1928, after the adjudication in bankruptcy.

In the first place it does not appear what Mr. Schwan meant by saying that he knew Mr. Gordon "was broke." That is, it does not appear at what time Mr. Schwan's statement relates to, whether Mr. Schwan meant to say that he knew at the time of the conversation on July 10th that Mr. Gordon was broke or whether he knew at some previous time that Mr. Gordon was broke. If it related to a previous time there is no indication as to what previous

time Mr. Schwan was referring to. Again, it does not appear to any degree of certainty what Mr. Schwan meant by the term "broke" but from the connection in which the word was used it would not appear that Mr. Schwan meant to say that he knew Mr. Gordon was insolvent, for the reason that Mr. Schwan stated in the same conversation that the reason he took the tires away was that he knew "that Mr. Gordon probably would not get out of bed again as he was a very sick man at that time and wanted to get his account in shape." [Tr. of Rec. p. 18.]

Furthermore, the later conduct of Mr. Schwan in his dealings with the bankrupt indicates very definitely that he did not know or believe that Mr. Gordon was insolvent at the time the merchandise was returned. We shall discuss this phase of the situation in connection with our discussion as to whether appellant had reasonable cause to believe a preference would be effected.

(b) The witness Blodgett testified [Tr. of Rec. p. 20] that he told Mr. Schwan that his company (Richfield Oil Company) had put Mr. Gordon on a cash basis. The witness Blodgett further testified that he and Mr. Schwan had a conversation with Mr. and Mrs. Gordon on the 8th day of May, 1928, relative to their financial condition in general. [Tr. of Rec. p. 20.] In that conversation it appears that Mr. Gordon was asked for a financial statement as of that date and that the bankrupt and his wife consented to have Mr. Blodgett and others take an invoice of the stock and that they took such an invoice and made an appraisal of the building and equipment [Tr. of Rec. p. 20] and after that invoice was taken and that appraisal was made, a financial statement was prepared by Mr.

Blodgett with the assistance of Mrs. Gordon and Mr. Schwan, which financial statement appears at pages 34 to 36, transcript of record. This financial statement shows a net worth of $4,748.88. We call attention to the fact that in the statement the item $4,748.88 is referred to as "total liabilities" but it is apparent that this item is intended to indicate net worth. The testimony of the witness Blodgett is to that effect. [Tr. of Rec. p. 24.]

We think that this statement, made under the circumstances indicated, has great bearing on the question of whether the proof shows that the bankrupt was insolvent on April 18th, 1928, and whether the appellant had reason to believe that a preference would be effected by reason of the return of the merchandise in question. The witness Blodgett admits that before this statement was made he had a conference with Mr. and Mrs. Gordon and that they discussed their financial affairs. Not satisfied with the discussion and with the information obtained from Mr. and Mrs. Gordon, Mr. Blodgett made an invoice of the stock and an appraisal of the equipment, and with that information in hand, he prepared the statement referred to and that statement showed a net credit balance of over $4,000.00. When Mr. Blodgett transmitted this statement to his company he must have believed that Gordon was solvent. He could not, in fairness to his own company, have transmitted such a statement as this unless he did believe Gordon to be solvent. This is important in two respects:

1st—If Mr. Blodgett, after a personal inspection and appraisement of the property, believed that Gordon was solvent it is but reasonable to suppose that Mr. Schwan

believed the same thing, as the testimony shows that Mr. Schwan had a copy of the appraisement made by Mr. Blodgett, and assisted in making it out. [Tr. of Rec. p. 33.]

2nd—If Mr. Blodgett believed that Gordon was solvent on May 8th, 1928, when this statement was prepared, his testimony to the effect that he believed Gordon to be insolvent at all times after January 1 cannot be true.

(c) The witness Blodgett testified that Gordon gave him a statement in January, 1928, showing a net worth of $17,000.00. [Tr. of Rec. p. 24.]

(d) Testimony of Mr. Blodgett that in his opinion bankrupt was insolvent. [Tr. of Rec. pp. 26, 40 and 41.]

An examination of the testimony of Mr. Blodgett at the pages last referred to indicates to us that the witness was going as far as he could possibly go to give the answers which the Referee evidently desired him to give in the insistent questions put to him and yet at no time does the witness state definitely that he ever told Mr. Schwan that the bankrupt was insolvent, and at no time does he give any facts from which the court was justified in finding that the bankrupt was in fact insolvent.

In his answer appearing on page 41, transcript of record, he gives the fullest account of his reason for thinking that the bankrupt was insolvent. Those reasons were that he had a large amount of stock which was unpaid for; that he had an unreasonable amount of credit on his books that, in the judgment of the witness, was not collectable; that he had included in his statement an item of $6,000 or $7,000 as representing the value of a lease when he had no

lease; that he stated the amount his building was worth was in excess of its worth and that he was unable to meet his obligations when due.

The fact is that in neither financial statement before the court is there any item representing a lease of the value of $6,000 or $7,000, or any sum. There is an item in the statement shown at page 28 [Tr. of Rec.] of $7,000 for an "option on business property." If that is what the witness referred to as a lease it is of no special significance for if that item were eliminated entirely from this statement it would still leave the bankrupt a net worth of over $18,000 according to such statement. Furthermore, neither the item "option on business property" nor the item "building" which appeared in this statement [Tr. of Rec. p. 28] is included in the statement which the witness Blodgett prepared, shown on page 36 [Tr. of Rec.], and in that statement there is a net credit balance of nearly $5,000.

But the most convincing reason for believing that the witness Blodgett was not in good faith in giving his conclusion that the bankrupt was insolvent is found in his statement just referred to, to the effect that the bankrupt had a large amount of credit on his books which was not collectable. In the property statement shown at page 34 of the transcript of record which Mr. Blodgett himself obtained from the bankrupt, there appear two items of accounts receivable aggregating $5,214.03. Mr. Blodgett says that a large amount of these accounts were uncollectable and that this fact led him to believe that the bankrupt was insolvent. Yet, if we eliminate entirely those two items representing accounts receivable, we would find that the bankrupt would lack only $465.15 of being solvent. But it is not reasonable to suppose that the accounts re-

ceivable referred to, which Mr. Blodgett incorporated in a statement made to his own company for the purpose of showing the financial condition of this bankrupt, were entirely worthless, or anywhere near worthless. Mr. Blodgett doesn't claim that these accounts were worthless, but merely claims that he found a large number of them which were, in his judgment, uncollectable. Before his statement that a large number of these accounts was uncollectable is accepted as showing insolvency, he should be required to show what particular accounts they were, his means of knowing their value, and the aggregate amount of the so-called uncollectable items.

It thus appears that not one substantial reason was given by the witness to justify his conclusion that the bankrupt was insolvent.

(e) Report and statement of Bradstreet Company. [Tr. of Rec. p. 28.]

This report was based upon information gathered in November, 1926. This report was made on March 21, 1928, but the report states [Tr. of Rec. p. 29] that according to the opinion of authorities consulted "there seemed to be no change in the business during the past year" and the report indicates a net worth of from $10,000 to $15,000.

(f) It further appears from the testimony of the witness Blodgett that it was his opinion at the time that he was negotiating with the bankrupt regarding remaining in business, that the property of the bankrupt might be sold for a sufficient sum to pay all his obligations. The testimony of the witness on this point is as follows:

> "Mr. Schwan and Mr. Swanholm of our company came to San Diego and together we discussed the situation pretty thoroughly because we were even trying to work out a plan whereby Mr. Lessar could be brought into the breach with guaranty, or with money, or with a lease on the property that would allow them to sell their equipment and stock, together with the lease, for a sufficient amount to take them out of the hole." [Tr. of Rec. p. 40.]

It appears from this testimony that the witness at the time in question thought there was a possibility of making such arrangements as would permit the property to be sold for sufficient to pay the bankrupt's debts, as his statement about taking them "out of the hole" can have no other meaning. Again we insist that this statement of the witness contradicts and refutes his testimony to the effect that the bankrupt was insolvent at all times after January 1, 1928.

The foregoing summary is all of the evidence we can point to in the record which tends in any way to prove the very essential fact that the bankrupt was insolvent.

Thus we see that the only testimony tending to prove insolvency is the statement by Mr. Schwan that he knew the bankrupt was "broke"; the statement by Mr. Blodgett that he told Mr. Schwan that his company had put Gordon on a cash basis; the conclusion of Blodgett that the bankrupt was insolvent together with the opinion of the same witness that some of his accounts receivable were uncollectable and he was unable to pay his obligations when due, and that bankrupt had no lease. Over against the foregoing evidence we have the following facts which are uncontradicted and most of which were furnished by appellee's own witness, tending to prove solvency: Finan-

cial statement prepared by Blodgett, Schwan and Mrs. Gordon [Tr. of Rec. pp. 34-36] after an inventory and appraisal of the property, showing a net worth of nearly $5,000; Mr. Blodgett says Gordon gave him a statement in January, 1928, showing a net worth of $17,000; statement made by Blodgett to his company in which he assured his company that their account would be collected in full; and the testimony of Blodgett that he was trying to arrange matters so that the property could be sold for enough to "take them out of the hole," and Bradstreet's statement showing a net worth of from $10,000 to $15,000.

BURDEN OF PROOF.

The burden was upon the trustee to prove insolvency at the time of the transfer.

Remington on Bankruptcy, Vol. 1, Secs. 182, 188; Vol. 4, p. 639.

This is true since the adjudication creates no presumption as to insolvency on any date prior to the date of adjudication.

In re Star Spring Bed Co. (C. C. A.), 265 Fed. 133;

In re Chappell, 113 Fed. 545;

Remington on Bankruptcy, Sec. 1764.

In the case *In re* Chappell, *supra*, the court points out that an adjudication isn't even evidence of insolvency at the time of the filing of the petition, for the reason that a solvent person may file a petition in bankruptcy and be adjudicated. As to the adjudication being evidence of insolvency at any date prior to the adjudication, the court says (p. 547):

"Let us, however, for argument's sake, assume that the adjudication established the fact of insolvency on the 8th of November, the date of the filing of the bankrupt's petition and of the adjudication. This fact alone, whilst consistent with, did not show insolvency at a previous date. In the case *In re* Rome Planing Mill (D. C.), 96 Fed. 812, a proceeding in involuntary bankruptcy wherein the petition was filed on the 8th of November, 1898, and the controversy was whether or not certain judgments against the bankrupt corporation obtained on the 17th of October, 1898, were suffered or permitted by the debtor while insolvent, District Court Judge Coxe of the Northern District of New York said:

" 'As before stated, it is necessary for the petitioners to prove the judgments, the levy, the sale and the insolvency on Oct. 17, 1898, the date of the judgments. The referee finds all these facts except the insolvency. The finding that the company was insolvent Nov. 1st does not meet the requirements of the statute. The company might have been solvent on Oct. 17th and hopelessly insolvent two weeks later.' "

We insist that the appellant has not sustained the burden which the law thus imposes upon him, as there is no testimony whatever as to the value of the assets or the amount of the liabilities except what is contained in the two financial statements herein referred to. Since it is the rule that insolvency must be proved as any other fact is proved, the only competent proof of insolvency would be proof as to what the nature and extent of the debtor's property is, together with testimony of its fair valuation and testimony as to the extent of his liabilities. Such testimony would bring the proof within the provision of subdivision 15 of section 1, Bankruptcy Act, defining insolvency. On this proposition appellant cites:

Jump, as trustee, etc. v. Burnier (Mass.), 108 N. E. 1027;

Schloss v. Strefellow & Co., C. C. A. 3rd Ct., 156 Fed. 662.

The case of Jump v. Burnier, *supra,* was a suit by a trustee in bankruptcy to set aside a preference, the suit having been brought in the state court of Massachusetts. In commenting upon the kind of proof which had been relied upon to prove insolvency, the court said:

> "The testimony offered to show the value of the assets and the amount of the debts could not designedly have been more vague, indefinite and unsatisfactory. It does appear that there were three parcels of real estate, in the city of Cambridge, but no evidence was produced or offered to show the fair value of any single parcel or of all of the parcels, nor was there any testimony of market value, assuming that in a supposable case there may be a difference in those terms of measure of value. The evidence showed that the first of the three parcels was let out at a gross weekly rental of $35.00, and the third, a double house, was occupied by Burns, his son, with no stated rental value. No testimony appears to have been given of the fair or market value of any personal property. It would be possible to estimate the annual rental value of the two rent producing parcels, but no data exists upon which an opinion can rest of the market or rental value of the third parcel.
>
> "Even if it were possible to determine by estimate the rental value of these properties, the fair or market value remains an unanswered speculative question. So long as this question remains unanswered it is impossible to say that Burns was insolvent when he gave the assignment to Burnier. As to the debts, the son testified:
>
> " 'Well, I don't know; the schedule in bankruptcy will show that. I think $25,000.'

> "Again: 'I couldn't state the exact amount. I should estimate 25,000; I don't know whether I am 10,000 out or not.'
>
> "The precise question was whether the property of Burns at a 'fair valuation' would be sufficient to pay his debts, and for the solution of that question it would be quite as needful to ascertain with some degree of precision the amount of his debts as the value of his property."

Th case of Schloss v. Strefellow & Co., *supra,* was an involuntary bankruptcy proceeding and the issue was whether the alleged bankrupt had committed an act of bankruptcy while he was insolvent. Before the trial the court had made certain orders by which certain claims of creditors had been established together with the amount thereof. These orders were relied on at the trial as proving conclusively the fact of insolvency. No other testimony as to the amount of indebtedness was offered. In holding that this was not sufficient proof to enable the court to pass upon the question of insolvency, the court said (pp. 663-664):

> "The precise question as defined by the Bankruptcy Act was whether the property of Schloss would, at a fair value, be sufficient in amount to pay his debts and for the solution of that question it was quite as needful to ascertain the amount of his debts as the value of his property. These elements were both inherent in the question of his insolvency."

In the case at bar there was not only no competent proof as to the nature and value of the bankrupt's property, but there was no proof whatever as to the extent of his liabilities except the proof that was contained in the two property statements to which we have referred, and both those property statements show solvency. If by the term insol-

vency were meant inability to pay debts as they mature, it might be conceded that there is some evidence to show that the bankrupt was in such condition. But we confidently urge that there is no proof of insolvency as that term is defined by subdivision 15, section 1 of the Bankruptcy Act.

Assignment of Error Number Two. [Tr. of Rec. p. 45.]

REASONABLE CAUSE TO BELIEVE THE TRANSACTIONS WOULD EFFECT A PREFERENCE.

The burden is not only on the trustee to prove that the bankrupt was insolvent at the time of the transaction in question but he must prove further that the creditor had reasonable cause to believe that a preference would be effected as a result of the transaction.

Remington on Bankruptcy, Sec. 1829.

SUMMARY OF TESTIMONY AS TO REASONABLE CAUSE TO BELIEVE A PREFERENCE WOULD BE EFFECTED.

We propose to summarize the testimony that was before the court on the question of whether the appellant had reasonable cause to believe that a preference would be effected by the return of the merchandise in question.

(a) At page 21, transcript of record, appears a letter dated April 4th, 1928, written by the manager of the India Tire & Rubber Co. to the manager of the Richfield Oil Co. at San Diego in which it appears that the India Tire & Rubber Co. was counting upon Gordon remaining in business and apparently had no thought of the business being closed. It appears from this letter that the manager of the India Tire & Rubber Co. was willing to assist the

Gordons to procure a good salesman to handle the business. Apparently the manager realized that on account of Mr. Gordon's illness the business was not being properly cared for and that a salesman was needed to put the business in the condition that it should be in.

(b) At page 22, transcript of record, the witness Blodgett states:

> "After the conversation of May 8th, I attempted to work out a scheme to relieve him in his financial condition and I took up that question with Mr. Schwan of the India Tire & Rubber Co."

After that conversation between Blodgett and Schwan the letter of May 17th, appearing at page 22, transcript of record, was written setting out a copy of a telegram which Mr. Schwan, of the India Tire & Rubber Co., had sent to his factory. This telegram and a reply thereto which appears at page 23, transcript of record, show that the appellant and the Richfield Oil Co. were working together as late as May 17, 1928, which was thirty days after the tires were returned, to keep the Gordons in business and that neither concern was expecting bankruptcy or a closing of the business. If the business continued there would be no occasion for a preference on the part of any creditor. It would be only in case of the failure of the business that a preference would occur and these telegrams show that as late as May 17th both of these principal creditors were expecting the business to continue and to pay out.

(c) At page 25, transcript of record, is further evidence of the efforts of Blodgett and Schwan to keep the business going and further evidence that they expected that the business would be kept going. These men were

then talking about getting an additional salesman for the Gordon business. Here the witness Blodgett states that he and Mr. Schwan were endeavoring to get somebody to refinance Mr. Gordon so that he could get out of the period of depression and "bring ourselves out of the woods." These men were at this time looking to the future and to the success of the business and not to its failure or to the necessity of bankruptcy.

(d) Again at page 26, transcript of record, it appears that Gordon and Schwan were enlisting the aid of Mr. Lessar to make possible a continuation of the business. Again at pages 37-38, transcript of record, it appears that Mr. Blodgett had reported to his company that Gordon's account would be paid in full. The letter of the credit manager of the Richfield Oil Co. to Mr. Blodgett, set out at the pages last mentioned, states:

> "Your assurance of the ultimate collection in this instance has made us feel easier about the situation and we certainly appreciate the efforts you are making to protect us on the balance outstanding."

Here we have evidence that about the 12th of March, 1928, Mr. Blodgett, who now attempts so earnestly to show that Gordon was at all times insolvent, was assuring his own company of the ultimate collection of their claim against Gordon. Presumably his assurance to his own company was given in good faith and presumably Blodgett had reason then to think that Gordon would not fail in his efforts to put the business "out of the woods." All through Mr. Blodgett's testimony he tries to make it clear that he and Mr. Schwan were working together and conferring together about Gordon's affairs. If Mr. Blodgett was sanguine enough of success so that he could give his

company assurance of the collection of their account in full, it is not unreasonable to think that Mr. Schwan was as hopeful of the success as Mr. Blodgett seemed to be. In fact, Mr. Blodgett [Tr. of Rec. p. 38] at the time this letter was written (referring to the letter to him of March 12th) stated, "I had told Mr. Schwan about the conditions out there at Gordon's." If they were as hopeful of success as they seemed to be, there was no reason for Mr. Schwan to anticipate that the business would fail, and if the business did not fail there would be no reason to think that the return of the tires in question would result in a preference in favor of the appellant.

(e) If any doubt remains as to Mr. Schwan's thought regarding the success of the efforts of himself and Mr. Blodgett to save the business of Mr. Gordon, that doubt is dispelled by the statement of Mr. Blodgett [Tr. of Rec. p. 39] as follows:

> "Mr. Schwan was of the opinion that he and I, working together, would avoid a calamity in this matter."

(f) The evidence shows [Tr. of Rec. p. 27] that before appellant accepted a return of the merchandise in question Mr. Schwan took precaution to inform himself as to the debtor's financial condition. He called upon Bradstreet & Co. for a financial report. The testimony shows that this report was forwarded to the appellant on March 21, 1928, and in that report the bankrupt was given a net credit rating of from $10,000 to $20,000. We contend that this is evidence of the utmost of good faith on the part of appellant. Presumably Mr. Schwan knew that Mr. Gordon was having financial difficulty at the time that this inquiry was made but he apparently preferred to call

upon a substantial and responsible commercial agency for definite information rather than to rely upon the uncertain information and rumors which he already had. In response to his request, the report was given in due course. Mr. Schwan was presumably acquainted with what Mr. Gordon's financial condition had been in the past and when he received the financial report in which Bradstreet & Co. had stated that there "had been practically no change in the business during the past year" it is but natural that Mr. Schwan would have concluded that Gordon was solvent. It would be most unnatural for Mr. Schwan to have called on Bradstreet & Co. for this report and, after having received it, come to a conclusion that Gordon was insolvent, in the face of the showing made by this report.

(g) It appears from the testimony that the reclaiming of these tires on April 18th, 1928, was not an unusual circumstance in the relations of the appellant and the bankrupt and other tire dealers. At transcript of record, page 30, it appears that in October, 1927, $4,500 worth of merchandise had been returned to appellant by Gordon and at page 33, transcript of record, it appears that the same practice prevailed in appellant's dealings with other customers.

(h) In the testimony of the witness Storms [Tr. of Rec. pp. 30-33] the witness gives in detail his conversation with Mrs. Gordon, who was in charge of the business at that time he took the tires from Gordon's place of business on April 18th. Among other things the witness says that Mrs. Gordon agreed that this was the proper thing to do; that Mrs. Gordon was very optimistic of the success of the business in the future; that they would be

able to carry on the business and pay out all they owed in a short time. Now if Mrs. Gordon did not give this assurance to the witness Storms on the occasion in question, it is fair to assume that she would have been called as a witness in behalf of the trustee in this proceeding to contradict and refute the testimony of Storms as to what she said on that occasion but no such testimony was given and neither Mr. nor Mrs. Gordon was called to testify in behalf of the trustee. If Mrs. Gordon did make the statements to Mr. Storms to which Mr. Storms testified, it is the most convincing evidence of the faith of these people in the success of their efforts to keep this business going and to "avoid a calamity" and of the fact that both Storms and Schwan shared that faith. The testimony of the witness Storms further shows that the reason they took a return of the merchandise was that they felt that Mr. Gordon was overstocked and that the company needed the merchandise to supply its trade. The witness states that he told Mrs. Gordon that this was the reason they wanted the merchandise returned. Again, if this were not true, we say that the objecting trustee would certainly have called Mrs. Gordon to furnish the necessary refutation. But if it is true that the reason the appellant reclaimed the tires was because Gordon was very sick and was overstocked and appellant needed the tires for its trade, and further, if it is true that at the time this was done both the Gordons and the appellant expected and believed that the business of the bankrupt was to be kept going, there is no support for the finding of the Referee that the appellant had reasonable cause to believe that a preference would be effected by the return of this merchandise.

(i) Further evidence of the faith of the appellant in the success of Gordon's business is found in the fact that from January, 1928, to the time the goods were returned, appellant had sold Gordon $6,500 worth of merchandise on credit. [Tr. of Rec. p. 32.]

WHAT CONSTITUTES REASONABLE CAUSE TO BELIEVE THAT A PREFERENCE WOULD BE EFFECTED?

On this proposition we cite:

McLaughlin v. Fiske Rubber Co., 288 Fed. 72;

Studley v. Boylston Bank, 229 U. S. 523, 52 L. Ed. 1313;

In re Wright-Dana Hardware Co., 203 Fed. 297;

Gilbert's Collier on Bankruptcy, pp. 852, 848-849;

Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971.

The rule is thus stated in Gilbert's Collier on Bankruptcy, page 852:

> "The fact that most of the bankrupt's indebtedness to a creditor was past due at the time of a payment on account is not sufficient to charge a creditor with notice of the bankrupt's insolvency; neither is the fact that a firm is unable to meet all its obligations as they fall due alone sufficient to cause a reasonable belief that he is insolvent."

Again at page 848 the same author says:

> "If the bankrupt was concededly unbusinesslike and slovenly in his business transactions, a failure to maintain his credit by prompt payments and a shortness of cash and absence of free capital continuing for a long time without insolvency, are not of themselves enough to put on inquiry all who deal with him."

Cause to suspect insolvency is not synonymous with reasonable cause to believe that the debtor is insolvent.

Grant v. National Bank, *supra,* was a case brought by a trustee in bankruptcy to set aside a mortgage executed by the bankrupt within four months prior to bankruptcy. In the opinion Mr. Justice Bradley states the rule thus:

> "It is not enough that the creditor has some cause to suspect the insolvency of his debtor; but he must have such knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of a community altogether too insecure. A man may have many grounds of suspicion that his debtor is in failing circumstances and yet have no cause for well grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the act requires may be wanting."

McLaughlin v. Fiske Rubber Co., *supra,* is a case very similar indeed to the case at bar. The bankrupt had been purchasing tires of the defendant tire company and one of the salesmen of said company called at the bankrupt's place of business and demanded payment of the amount due. The bankrupt stated that he was overloaded with tires and did not have the money to pay. The salesman made another call with the same results. Thereupon the salesman suggested that the bankrupt return the goods, or a portion of them, and take credit at the price at which the goods had been charged to him. To this arrangement the bankrupt consented. It later appeared that the bankrupt was insolvent at the time of this transaction but except that Reed, the salesman, knew that the bankrupt was over-

stocked and was unable to meet his obligations in cash, the tire company had no knowledge or reason to believe that the bankrupt was at that time insolvent. In holding that this transaction did not amount to a voidable preference the court said:

> "It can hardly be said that the bankrupt's inability to pay in cash as the payments for the tires became due would necessarily lead a reasonably prudent man to conclude that bankrupt was insolvent or would be unable to pay his debts in the usual course of business. Especially is this true in view of bankrupt's statement, which appeared to be trustworthy, that he was carrying a surplus stock. I do not find that the defendant knew or had reasonable cause to believe that a preference was intended or would be effected by taking over the tires and selling them at an advanced price."

Mere Knowledge of Insolvency Not Sufficient.

Studley v. Boylston Bank, *supra*, is authority for the proposition that knowledge of insolvency on the part of the creditor will not alone be sufficient to avoid a payment made by the debtor to a creditor. In that case the defendant bank had extended credit from time to time to the Collver Company, the bankrupt. After the bankrupt had thus become indebted in a large amount to the bank, the officers of Collver Company showed the officers of the bank a statement which showed that the company did not have assets sufficient to pay its liabilities. Notwithstanding the knowledge of this situation, the bank made additional loans to the bankrupt and accepted payments from time to time to apply on account, but made the loans with the belief that notwithstanding the insolvency of the Collver Company it would succeed in working itself out of its financial

difficulty and the bank believed, therefore, that no preference would result from the payments it accepted from time to time.

From the opinion by Mr. Justice Lamar we quote (p. 526):

> "There is nothing in the statute which deprives a bank, with whom an insolvent is doing business, of the rights of any other creditor taking money without reasonable cause to believe that a preference will result from the payment. The Bankruptcy Act contemplates that by remaining in business and at work an insolvent may become able to pay off his debts. It does not prevent him from continuing in trade, depositing money in a bank, drawing checks and paying debts as they mature, either to his own bank or any other creditor. It does provide, however, that if bankruptcy ensues all payments thus made within the four-month period may be recovered by the trustee if the creditor had reasonable cause to believe that a preference would be thereby effected."

Here we find a clear distinction expressed between mere knowledge of insolvency and reasonable cause to believe that a preference would result from a payment made or from property taken by a creditor.

In the Studley case there appears to be no question that the bank's officers knew that the debtor was insolvent at the time the payments in question were made but they knew business was being obtained by the bankrupt, knew deposits were made, and it appears that all concerned believed that the business would finally be a success. As long as the creditor believed such to be the case there is no room to contend that he had reasonable cause to think that a preference would result from his transaction with the debtor. Reasonable cause to believe that a preference will

result cannot exist as long as there exists a reasonable expectation that a business will succeed.

In the case at bar we have pointed out from the evidence the facts which we believe indicate beyond peradventure of doubt that not only Mr. Schwan and the others connected with the India Tire & Rubber Co., but Mr. Blodgett and the other creditors all confidently expected the business of the bankrupt to ultimately pay out. Ample evidence of this fact is found in the financial statement prepared by Mr. Blodgett and Mr. Schwan, with the assistance of Mrs. Gordon, after an inventory and appraisal of the stock had been made on May 8th, 1928. These men, after a careful survey of the situation, prepared a statement which showed a net credit balance of nearly $5,000 and Mr. Blodgett was so sure that this statement was a fair reflection of the financial condition of the bankrupt that he sent it to his company and continued thereafter, in co-operation with Mr. Schwan, his efforts to place the business on a paying basis.

The same rule as is found in Studley v. Boylston Bank is also announced in the matter of Wright-Dana Hardware Co., *supra*. This is a case from the Circuit Court of Appeals, Second Circuit. From the opinion we quote:

> "Our attention is called to the fact that the referee found that the Wright-Dana Company was insolvent on Sept. 15, 1911 (four months before bankruptcy), and continued to be insolvent to the date of its adjudication in bankruptcy on Feb. 5th, 1912, and that during the whole of that time the fact of its insolvency was known to the bank. All this may be true and yet not deprive the bank of its right to set-off. A bank may do business in the usual manner with one it knows to be insolvent. The mere fact of insolvency or mere knowledge of the insolvency of the depositor

is not alone sufficient to take away the bank's right of set-off."

The writer of the opinion then quotes with approval from Studley v. Boylston National Bank to the effect that it is belief that a preference would be effected by the transaction and not knowledge of insolvency which determines the validity of a transaction with an insolvent debtor.

Not only is it true that it is the policy of law, and of the Bankruptcy Act in particular, to permit debtors who are in financial difficulties to continue in business rather than to be forced into bankruptcy but it is also the policy of the law that where two inferences may be drawn from the facts proved, that inference will prevail which will sustain a transfer rather than invalidate it. The rule is so stated in Gilbert's Collier, page 64, and *In re* Gaylord, 225 Fed. 234.

Conclusion.

In conclusion we call attention to the fact that no findings were made by the District Court. Findings were made by the Referee to the effect that the debtor was insolvent at the time of the return of the merchandise in question and to the further effect that the appellant had reasonable cause to believe that the bankrupt was insolvent and that the transfer would effect a preference. Notwithstanding this finding, it is our contention that this court may determine for itself the questions of fact thus presented:

1. For the reason that there is no conflicting testimony, and

2. Because this is an equity proceeding and the court may examine the entire record.

On the first proposition just referred to we quote Gilbert's Collier on Bankruptcy, page 571, as follows:

> "A referee's finding concurred in by the District Court that a creditor received a payment from a debtor who had reasonable cause to believe that a preference would be effected will not be set aside on appeal on anything less than a demonstration of plain mistake. But if the finding of the district judge be a deduction from established facts or uncontradicted evidence, the Circuit Court of Appeals is at liberty to draw its inference and deduce its own conclusions."

On the second proposition just referred to we cite *In re* Gregg (C. C. A., 8th Cir.), 9 Fed. (2nd) 43, and from the opinion in this case we quote:

> "The referee found that the bankrupt was solvent at the time of the levy. The trial court expressly declined to rule upon the question of insolvency, sustaining the referee upon other questions which we have not discussed. Appellant contends that this court must accept the finding of the referee as to solvency. This is an equitable proceeding and we may examine the entire record. Nor are we faced with the situation that the finding of the referee is affirmed by the trial court. We entertain no doubt of our right and duty to examine the record and determine this matter of fact therefrom."

For all the foregoing reasons we ask that the decision of the District Court be reversed.

Respectfully submitted,

MINOR MOORE and
C. V. CALDWELL,
Attorneys for Appellant.

No. 5981

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
GILBERT S. GORDON,
Bankrupt.

India Tire & Rubber Company,
Appellant,

vs.

Carl O. Retsloff, Trustee in Bankruptcy of Gilbert S. Gordon, Bankrupt,
Appellee.

APPELLEE'S BRIEF AND ARGUMENT ON APPEAL.

WILL M. TOMPKINS,
OF
TOMPKINS & CLARK,
Attorneys for Appellee.

FILED
JAN 22 1913
PAUL P. O'BRIEN
CLERK

FRYE & SMITH, SAN DIEGO.

TOPICAL INDEX

TABLE OF CASES AND AUTHORITIES CITED

No. 5981

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
GILBERT S. GORDON,
Bankrupt.

India Tire & Rubber Company,
Appellant,

vs.

Carl O. Retsloff, Trustee in Bankruptcy of Gilbert S. Gordon, Bankrupt,
Appellee.

RESPONDENT'S BRIEF AND ARGUMENT ON APPEAL.

STATEMENT OF FACTS.

Gilbert Gordon was adjudicated a bankrupt on the 18th day of June, 1928, and thereafter Carl O. Retsloff was duly appointed Trustee. The India Tire and Rubber Company, the appellant in this case, was on or about the 18th day of April, 1928, a creditor of the said bankrupt in the amount of $11,585.38. That in accordance with the evi-

dence adduced upon the original hearing in this matter, this amount had been due and owing to the said India Tire and Rubber Company for many months prior to April 18, 1928. Of this amount there was past due on unpaid trade acceptances $1,464.00 due on January 27, 1928, $317.05 due and unpaid on March 13, 1928, and $2,541.95 due and unpaid on March 27, 1928. These trade acceptances were all dishonored and were part of the original debt of $11,-585.38.

That for a period covering some six months prior to the 18th day of April, 1928, the only payment made by the bankrupt or credit extended to him was for returned goods and discounts, and that on or about the 18th day of April, 1928, appellant, the India Tire and Rubber Company, took from the bankrupt's place of business tires and tubes for which credit was given to the bankrupt on account in the sum of $2,546.84.

Testimony further discloses (Tr. of Rec., p. 42) that the market value of the tires taken back from Mr. Gordon on or about the 18th day of April, 1928, would be worth from 25% to 40% less than the prices on the credit memorandum, and that the credit memorandum bears a statement as follows: "Taken to liquidate account."

That subsequent to the appointment of a Trustee, appellant filed a claim against the estate of the bankrupt in the sum of $9,038.54 to which claim the Trustee objected on the ground that appellant had received a preference within the four months immediately preceding the filing of the petition, and that said appellant had received such preference knowing the bankrupt was insolvent at the time said

preference was given. That thereafter, and on or about the 4th day of February, 1929, a hearing was had before the Honorable F. F. Grant, Referee in Bankruptcy in and for the Southern District of California, Southern Division, for hearing proofs on the objections, and at that time evidence was submitted by the Trustee and by the claimant.

That the said Referee sustained the objections of the Trustee to the allowance of said claim and appellant demanded a review by the District Court of the United States in and for the Southern District of California, Southern Division, and upon the same testimony the District Court made an order affirming the decision of the Referee.

ARGUMENT.

Without deviation or detour, appellant has in its brief, and on page 4 thereof, come immediately to the meat of the action. First, appellant states that before the decision of the Referee and the United States District Court on review shall be sustained it must appear: (a) That the debtor was insolvent at the time of the transaction in question; (b) That the appellant had reasonable cause to believe that the transaction would effect a preference.

It therefore devolves upon us to lay before this Honorable Court the unquestionable proof of both the insolvency of the bankrupt at the time of the transaction, and the appellant's knowledge that the transaction would effect a preference.

Mr. Schwan (who was credit manager of the India Tire and Rubber Company at the time of the transaction in question, but who died prior to the hearing before the Ref-

eree) stated to Mr. Retsloff, the Trustee, (Tr. of Rec., pp. 18 and 19) that he knew Mr. Gordon "was broke" and although this conversation did not take place until the 10th day of July, 1928, and after the adjudication in bankruptcy, it was at the same time that the agreement was reached between the Trustee, the Richfield Oil Company and the India Tire and Rubber Company through its representative, Mr. Schwan, that the Richfield Oil Company would return the preference which they received in the form of a note payable to the bankrupt and all monies collected on said note, and the India Tire and Rubber Company would return all the merchandise taken by them from the bankrupt on or about April 18, 1928. (Tr. of Rec., p. 17.)

From appellant's brief we are inclined to gather that appellant does not understand what Mr. Schwan meant by saying that he knew Mr. Gordon "was broke," and with this thought we respectfully submit that when a word is used to define any particular thing or object and that word is not comprehensible to the person to whom it is directed, it is then necessary for the purpose of obtaining the full intent and enlightenment of the descriptive word, to consult a lexicon if the word be a matter of legal propensity, and a dictionary if in English. And although we know that this court without question is fully advised as to the meaning of the words "was broke" we nevertheless for the purpose of the record desire to give the definition of the word "broke" as laid down in Webster's New International Dictionary of 1927, to-wit: "Ruined financially; bankrupt."

Not only did appellant know that Gordon was financially ruined and bankrupt, but appellant also knew that the bankrupt was sick, and appellant also knew that its account was all past due in the sum of $11,585.38; and appellant also knew that all of the trade acceptances had been dishonored by the bankrupt within the four months preceding the transaction involved; and appellant also knew that on or about the 18th day of April, 1928, and on the day that the property was removed, that the bankrupt had less than $5,000.00 in stock in his place of business; and appellant also knew that the bankrupt was heavily indebted to the Richfield Oil Company.

With the foregoing facts within its possession and knowledge, on and before April 18, 1928, appellant had reasonable cause to believe that Gordon was insolvent on the date the merchandise was removed, to-wit: April 18th, 1928. That upon the uncontradicted evidence of the Trustee and of L. D. Blodgett, it was proven without question that Mr. Schwan agreed to return said merchandise at such time as the Richfield Oil Company returned the preference received by them. Is it reasonable to believe that Mr. Schwan would have agreed to return said merchandise had he not been satisfied that appellant had received a preference as defined by the Bankruptcy Act? Is it reasonable to believe that Gordon was solvent on April 18th, 1928, when appellant removed said merchandise, and after said removal leaving in the place of business of said bankrupt merchandise of the total value at the market price at that time, of less than $1500.00?

There is a long line of cases referred to in Collier's 13th Edition, Vol. 2 at page 1250, particularly 45 American Bankruptcy Reports 373, *Schuetle & Co* vs. *Schwank;* the language of the court is as follows:

> "That a person shall be deemed insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed or transferred with the intent to defraud his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

W. S. Storms of the India Tire and Rubber Company testified (Tr. of Rec., pp. 30 and 31) that he went to San Diego from Los Angeles on the 4th day of April, 1928, and told Mr. Gordon that inasmuch as they had approximately five or six thousand dollars worth of merchandise on hand, that this be returned for credit.

R. W. Rawley testified that he was traveling auditor for appellant at the time of the transaction in question and that the market value of the tires taken from Gordon at the time they were taken back, would be from 25% to 40% less than Gordon had agreed to pay for them. This is a matter of computation which would reduce the value of the stock on hand at the time Mr. Storms visited and took the stock from Gordon, to an amount equal to three or four thousand dollars, and it was certainly within the knowledge of appellant that the aggregate of Gordon's property at a fair valuation was insufficient in amount to pay his debts. With the facts before the appellant as hereinbefore set out, we believe that the definition laid down in the case of *McGee* vs. *Branan and Carson Co.,* 5 Am. B. R. (N. S.) 60, fully covers the situation:

> "Where payment was made to a creditor from the proceeds of an insurance policy on the debtor's stock of merchandise under circumstances which strongly indicate a belief in the debtor's solvency, induced solely by his unverified statement as to his assets and liabilities, is not reasonable as the test is not the actual belief of the creditor but the belief that he ought reasonably to have entertained under the facts known to him."

Pursuant to the foregoing facts in the possession of appellant, and in accordance with the above decision, appellant had no alternative other than to have believed Gordon insolvent on April 18th, 1928.

We desire to point out that, considering the brief and argument of counsel in the most favorable light to appellant's case, it is truly an argument for the respondent. That from the transcript and record and from the brief and argument of appellant, this Honorable Court has been shown the facts and circumstances surrounding the whole transaction, and to pick out one or two particular situations, and to hang appellant's case upon these two nails of hope is not the method of arriving at the true situation. This Honorable Court has said that IT IS NOT THE ACTUAL BELIEF OF THE CREDITOR BUT THE BELIEF THAT HE OUGHT REASONABLY TO HAVE ENTERTAINED UNDER THE FACTS AND CIRCUMSTANCES KNOWN TO HIM.

The language of the Referee in the decision of this case as cited in the American Bankruptcy Reports, Volume 13, page 562, with relation to the return of the merchandise to appellant at the same price that the bankrupt agreed to pay

for said merchandise when appellant knew that the merchandise had depreciated from 25% to 40% in value, is more ably said than counsel feels justified in attempting, and for that reason we quote, as follows:

> "The evidence also as indicated above herein, without contradiction, shows that at the time the goods were taken from the bankrupt by claimant they were from 25 to 40 per cent less in value than the price paid by the bankrupt at the time of the sale to him, although the claimant extended to the bankrupt credit in the full amount of the purchase price. On this branch of the case the law seems to be well settled that such an unusual occurrence and manner of attempting to satisfy a debtor's debt is enough to indicate the India Tire and Rubber Company at the time they took the goods from the bankrupt had information as to the debtor's financial condition. It is not customary for merchants to extend bonus credits to their customers as a pastime, and to know that the claimant herein gave the bankrupt about one thousand and no/100 ($1,000.00) dollars credit for nothing, indicates that they had such information concerning the debtor's financial condition and knew he was insolvent.
>
> "In the case of *Bossak & Co.* vs. *Coxe* (C. C. A., 5th Cir.), 49 Am. B. R., 402, 285 F., 147, the court said: 'A transaction whereby a merchant creditor satisfied his debt in consideration of the transfer to him by the debtor of goods worth only half of the amount of the debt certainly is not one in the usual and ordinary course of mercantile business. In effect the appellant relinquished half of an unquestioned debt due to it for the price of goods sold for nothing in return for so doing. Such an unusual occurrence is prima facie evidence of fraud, and was enough to indicate that appellant had information as to the debtor's financial condition, and to cast on the appellant the burden of sustaining the validity of the transaction. *Walbrun* vs.

Babbitt, 16 Wall., 577, 21 L. Ed., 489; *Judson* vs. *Courier Co.* (C. C.), 15 F., 541; *Hodges* vs. *Coleman,* 76 Ala., 103; *Kansas Moline Plow Co.* vs. *Sherman,* 3 Okla., 204, 41 Pac., 623, and note, 32 L. R. A., 33, 58.' *In re Andrews* (C. C. A., 1st Cir.), 16 Am. B. R., 387, 144 F., 922.

"In the last above case cited, the Circuit Court of Appeals of First Circuit says:

'Creditors upon receiving from the bankrupt, within four months period, payment of pre-existing debts, by a return of goods had reasonable cause to believe that he was insolvent and that a preference was intended and must be surrendered before their claims could be allowed.' "

Answering Assignment of Error No. 1.

The proof of the insolvency of Gordon on April 18, 1928, is conclusive in this, that according to the testimony (Tr. of Rec., p. 21) W. R. Wheatley, manager of the India Tire and Rubber Company, wrote to Mr. Blodgett of the Richfield Oil Company, stating that he had been in San Diego and talked with Mr. and Mrs. Gordon, and it was necessary for Mrs. Gordon to have a good salesman but it was unfortunate that they were hardly able under the circumstances to pay a man on a salary basis, and that it was regrettable that this misfortune should be wished on one family. This letter is of April 4, 1928, about ten or twelve days before the transaction involved. Further proof of the insolvency on April 18, 1928, is a fact that the bankrupt was indebted to appellant on that day on past due indebtednesses of six months standing, $11,585.38. That on the same day, to-wit: April 18, 1928, (Tr. of Rec., p. 23) Gordon was indebted to Richfield Oil Company in the sum of $3996.40 on past due indebtednesses. That during the

six months immediately preceding the transaction involved, the bankrupt made no payment to appellant on account of said indebtedness. That it was necessary for a Mr. Lessar, a brother-in-law of Mr. Gordon, in San Francisco, to guarantee a certain bill of goods sold to Gordon by the India Tire and Rubber Company, and that Mr. Schwan, appellant's representative, made a trip to San Francisco in January of 1928 for the purpose of obtaining such a guarantee, but was unsuccessful. That according to the undisputed testimony adduced at the hearing, the property owned by the bankrupt on April 18, 1928, exclusive of that which was transferred, was not, at a fair valuation, sufficient in amount to pay his debts.

Answering Assignment of Error No. 2.

Answering appellant's statement contained on page 17 of appellant's brief and argument, the last paragraph thereon, it would appear that the letter written on April 4, 1928, by the manager of the India Tire and Rubber Company to the manager of the Richfield Oil Company, that the India Tire and Rubber Company expected Gordon to remain in business. Nevertheless, this Honorable Court is respectfully directed to the fact that the letter states in so many words, that they have not the money to pay even one salesman.

Appellant further states on page 18 that even as late as May 8th, Mr. Blodgett consulted with Mr. Schwan of the India Tire and Rubber Company in an attempt to work out a scheme to relieve Gordon's financial condition. It is only right to assume that both appellant and the Richfield

Oil Company should have rendered all assistance possible, even after April 18, 1928, as they both had received preferences, and any effort on the part of either the India Tire and Rubber Company or Richfield Oil Company in an attempt to assist the bankrupt after April 18, 1928, does not change the status of the situation.

Answering paragraph "d", page 19, of appellant's brief and argument, we respectfully submit that this letter was written in March, 1928, by the general manager of the Richfield Oil Company to Mr. Blodgett, and was offered in evidence for the purpose of disclosing the fact that the Richfield Oil Company had consulted with the India Tire and Rubber Company with reference to the condition of the Gordons financially, the last paragraph of which reads as follows:

> "May we ask that you also endeavor to obtain a schedule of liabilities in this case in order that we may know to whom this man is owing and to what amounts. This will put us in position to consult with other large creditors with a view of coming to some mutual understanding to preclude possibility of others attaching the business. We have already consulted with Mr. Wheatley, India Rubber manager for southern California, to this end. They will not press him."

Further answering alleged Assignment of Error No. 2, respondent does not feel that the Bradstreet financial report is of any value and needless to be commented upon.

In the case of *Rosenberg* vs. *Semple* (C. C. A. 3d Cir.), 43 Am. B. R., 671, the court wisely says:

> "Insolvency, owing to its nature, is not always susceptible to direct proof. It may, and in many cases

must be established by the proof of other facts from which the ultimate fact of insolvency may be presumed or inferred."

In the case of *Goetz* vs. *Zeif,* 3 Am. B. R. (N. S.), 532, the court says:

"In determining the question of reasonable cause for belief, facts showing the relation of the parties, their intimacy or lack of it, the usual or unusual nature of the transfer, the opportunities of the creditor for knowledge, the participation of the creditor, if any, in the business of the debtor, the fairness or unfairness of the witnesses as to the disclosure of relevant facts within their knowledge, are all subjects which may be properly considered."

CONCLUSION.

In conclusion we desire to state that appellant is in error when it is stated, on page 28 of appellant's brief and argument, that there is no conflicting testimony in the case at bar, for it would appear from the record that there is considerable conflicting testimony with reference to the solvency or insolvency of Gordon at the time of the transaction involved. However this conflict on the part of appellant be weak, nevertheless there is a conflict.

Respondent feels, however, that it is well taken that this court examine the entire record. But on the first proposition we find, in Volume 3, page 532 of Am. B. R. (N. S.), *Goetz* vs. *Zeif* (195 N. W., 74), this statement:

"Where many of the facts proven in an action to recover a preference were circumstantial, from which conflicting inferences might be drawn, the conclusions of the trial judge that the evidence did not show equitable assignments as claimed, and that the defendant

had reasonable cause to believe that payments would effect a preference, will not be disturbed although the appellate court might have reached different conclusions."

For all the foregoing reasons we ask that the decision of the District Court be affirmed.

Respectfully submitted.

WILL M. TOMPKINS,
OF
TOMPKINS & CLARK,
Attorneys for Respondent.

No. 5982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant

vs.

ROSE M. ALLEN,

Appellee

Transcript of the Record

On Appeal from the District Court of the United States for the District of Idaho Southern Division

FILED
NOV 1 1950
PAUL P. O'BRIEN
CLERK

No.....

IN THE

United States Circuit Court of Appeals

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GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant

vs.

ROSE M. ALLEN,

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Transcript of the Record

On Appeal from the District Court of the United States for the District of Idaho Southern Division

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

JAMES R. BOTHWELL
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Twin Falls, Idaho
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INDEX TO BILL OF EXCEPTIONS

Witnesses for Plaintiff

Witnesses for Defendant

In the District Court of the Eleventh Judicial District of the State of Idaho, in and for Twin Falls County.

ROSE M. ALLEN,

Plaintiff,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Defendant.

No. 7428

COMPLAINT

Comes now the plaintiff and for her cause of action against the above named defendant, complains and alleges:

I. That the defendant, the General Insurance Company of America, is a foreign corporation, with its principal place of business at Seattle, Washington, and is engaged in the business, in the State of Idaho—of insuring property against loss by fire.

II. That on the 20th day of September 1924, and at all times since that date, R. A. Reynolds and C. L. Reynolds, were and now are the fee title owners of the following described real property and appurtenances located at Filer, Idaho, and described as follows: Lots Twenty-eight (28) and Twenty-nine of Block Fourteen (14) of the final

and Amended Plat of the Townsite of Filer, Idaho, as the plat thereof is of record in the Recorder's Office of Twin Falls County, Idaho. That the improvements upon said lots as above described, were on the date above mentioned, a two-story, brick building. That the said property is more generally described as that property situate on the Northwest corner of Main Street and Park Avenue, Sanborn Fire Map Sheet 5, Block 29, Street No. 204, Filer, Idaho.

III. That on the 20th day of September, 1924, at Filer, Idaho in consideration of the payment by the said R. A. Reynolds and C. L. Reynolds, to the defendant, of the premium demanded by it, said defendant, by its agent, Arthur E. Anderson, duly authorized thereto, made its policy of insurance, in writing a copy of which is annexed hereto, marked "Exhibit A" and by this reference made a part hereof. That said policy was numbered by said defendant as ID601926. That said policy was for the term of five years from said 20th day of September, 1924, and in the amount of $10,000.00.

IV. That on the 29th day of August, 1928, at about the hour of 2 o'clock A. M. said building above described was totally destroyed by fire.

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That said building so insured by the defendant at the time of said fire was of the value of about $25,000.00 and that the loss and damage sustained

by the plaintiff herein by reason of such destruction was the sum of $10,000.00, the full amount of said policy.

V. That previous to the 20th day of September, 1924, said insured, towit: R. A. Reynolds and C. L. Reynolds, made, executed and delivered to this plaintiff, their certain mortgage in writing on the above described premises to secure the sum of $12,647.00. That said R. A. Reynolds and C. L. Reynolds turned said policy over to this plaintiff in further security of the debt secured by said mortgage, and thereupon defendant at the request of plaintiff and said insured, R. A. Reynolds and C. L. Reynolds, attached to said policy, what is known as "Standard Forms Bureau Form No. 371 of date of form July 1917" which contract form is entitled "Mortgage Clause with Full Contribution" and provides that loss or damage if any under this policy, on building only, shall be payable to Rosa M. Allen, the mortgagee, the plaintiff herein. That a copy of said form is a part of "Exhibit A" annexed hereto, and said contract form is by this reference made a part of this paragraph.

VI. That said mortgage and debt is secured thereby is wholly unpaid and unsatisfied, except that there has been paid upon said mortgage the sum of $2313.20, leaving a balance due and owing thereon in the sum of $10,313.80.

VII. That this plaintiff by the total destruction of said building by said fire lost all security for her said debt and mortgage, and said real property is now of no value whatsoever.

VIII. That under the terms of said contract form referred to in paragraph V. hereof it is provided that said defendant might cancel said policy as to the said insured, R. A. Reynolds and C. L. Reynolds but that it shall remain in full force for the benefit of said mortgagee for ten days after notice to the mortgagee that it desired to cancel said policy. That no notice of cancellation, or other notice of any kind, was ever mailed, delivered or served upon this plaintiff. That plaintiff had no knowledge of any kind of any cancellation, if any was made, as to said R. A. Reynolds and C. L. Reynolds and plaintiff alleges no cancellation of any kind was made as to R. A. Reynolds and C. L. Reynolds. That plaintiff at all times stood ready to pay on demand, any premium of any kind upon said policy, but no demand of any kind was ever made therefor upon this plaintiff.

IX. That on September 20th, 1928, plaintiff advised defendant that she desired to make proof of loss and asked that an adjuster be sent to assist in making proof or that forms be sent plaintiff that she might make such proof, and supply the same to defendant.

That said defendant although it advised that it received said notice and request, failed to send such adjuster or supply said forms for making proof of loss, and thereafter and on the 11th day of October, 1928, this plaintiff furnished defendant proof of loss, and duly performed in all *respectis* all the conditions of said policy on her part. That under proof of loss, said plaintiff's loss by said fire, was shown to be and is the sum of $10,000.00.

X. That the defendant has not paid the said loss or any part thereof, and fails, neglects and refuses so to do, although demand has been made therefor.

XI. That plaintiff is entitled to recover interest on said sum of $10,000.00 at the legal rate of 7% per annum from the 11th day of October, 1928, until paid.

WHEREFORE Plaintiff demands judgment against said defendant for the principal sum of $10,000.00 together with interest thereon from the 11th day of October, 1928 until paid, together with her costs herein expended.

W. D. GILLIS
Attorney for Plaintiff
Residing at Filer, Idaho.

(Duly verified)

Filed Dec. 12, 1928.
Transcript on removal filed Jany 28, 1929.

Exhibit "A"

STANDARD FIRE INSURANCE POLICY—
STOCK COMPANY
(Participating Plan)
No. ID601926

GENERAL INSURANCE COMPANY
OF
AMERICA.
Seattle, Washington.

Amount $10,000.00 Rate 1.63 Premium $130.40

IN CONSIDERATION of the stipulations herein named and of One Hundred Thirty and 40/100 ------ Dollars First Annual Premium, and by the payment of the then current annual premium to this Company, at or before 12 o'clock noon, on or before the 20th day of September in every year, renewing from year to year within said term, does insure C. L. and R. A. Reynolds for the term of five years from the 20th day of September, 1924, at noon, to the 20th day of September, 1929, at noon, against all direct loss or damage by fire except as hereinafter provided,

TO AN AMOUNT NOT EXCEEDING Ten Thousand and no/100 --- Dollars, on the following described property, while located and contained as herein described, and no else where, to-wit:

This Policy is made and accepted subject to the

foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions Required by Law to be Stated in This Policy. This Policy is in a Stock Corporation.

The Board of Directors, in accordance with Section 7 of the Company's Articles of Incorporation, may from time to time distribute equitably to the holders of the policies issued by said company such sums out of its earnings as in its judgment is proper.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly

authorized Agent of the Company at Filer, Idaho.

Frank B. Martin
Secretary

H. W. Dent,
President.

Countersigned at Filer, Idaho,
this 20th day of September, 1924.

Arthur E. Anderson,
Agent.

Arthur E. Anderson.

Form 102A-5M-10-23

1. This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part of the articles at

such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance whether valid or not on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or

repairing the within described premises for more than fifteen days at any one time; or, if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contract notwithstanding) there be kept used, or allowed on the above described premises, benzine, benzole, d y n a m i t e, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naptha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not

exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance of not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or

office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actu-

ally paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall for the ensuing five days only cover the property so removed in the new location; if removed to more than one location such excess of this policy shall cover therein for such five days in the proportion that the value in any one of such new location bears to the value in all such new locations; but this company shall not, in any case of removal whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall

bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required furnish a certificate of the magistrate or notary public

(not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and as often as required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appaise the loss, stating separately sound value and damage and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected

by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture therof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by an expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, in payment of the loss be subrogated to the extent

of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

STANDARD FORMS BUREAU FORM 76

BUILDING FORM (MERCANTILE)

On the following described property, all situate on the northwest corner of Main Street and Park Avenue, Sanborn Fire

Map Sheet 5, Block 29, Street No. 204, Filer, Idaho.

1. $10,000.00 On the two story comp. roof brick building and its additions (if any) of like construction communicating and in contract therewith, including foundations, sidewalks, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only while occupied for hardware & implement store, and dance hall purposes.

2. $ nil On.....

3. $ nil On.....

No insurance attached under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item.

Other insurance permitted.

Loss, if any, subject however to all the terms and conditions of this policy, payable to assured.

"Tenants' Improvements" separately insured for a specific amount under this, or any other policy,

are not covered by this policy except for such specific amount, if any, named herein.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. ID-601926 of the General Insurance Co Name of Company.

Agency at Filer, Idaho Dated September 20th, 1924.

INSURANCE MAP

Trade Mark
STANDARD

Sheet 5
Block 20
No. 204

ARTHUR E. ANDERSON
Agent,
Arthur E. Anderson.

PROVISIONS REFERRED TO IN AND MADE A PART OF THIS RIDER (NO. 76)

"Vacancy", If the building described hereunder is located within the incorporated limits of a city or town, permission is hereby granted for same to remain vacant or unoccupied without limit of time.

"Permits". Permission granted to make alteration or repairs to the above described building without limit of time, and to build additions, and if of like construction and communicating and in con-

tact therewith, this policy shall cover on same under its respective items pertaining thereto; permission also granted to do such work in said building as the nature of the occpancy may require to work at any and all times; and, when not in violation of law or ordinance, to generate illuminating gas or vapor, and to keep and use the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said building, it being warranted by insured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such breach. But notwithstanding anything herein contained, the use, keeping allowing, or storing on the within described premises of dynamite, fireworks, Greek fire, gunpowder in excess of fifty pounds, nitro glycerine or other explosive is prohibited and shall wholly suspend this policy during the period such use, keeping, allowing or storing shall continue unless a specific permit therefor is attached to this policy.

"Lightning Clause" This policy shall cover any direct loss or damage by lightning (Meaning thereby the commonly accepted use of the term "lightning" and in case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum

insured nor the interest of the insured in the property, and subject in all other *respectis* to the terms and conditions of this policy; Provided however, that if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not,

"Electrical Exemption Clause." If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to d y n a m o s, exciters, lamps, motors, switches, or any other apparatus for generating, utilizing, testing, regulating or distributing electricity, caused directly by electric currents therein whether artificial or natural.

STANDARD FORMS BUREAU FORM 371.

MORTGAGEE CLAUSE WITH FULL CONTRIBUTION

(To be attached only to policies covering buildings)

Loss or damage, if any, under this policy, on building only shall be payable to Rose M. Allen Mortgagee (or Trustee), as interest may appear. Subject to all the terms and conditions hereinafter set forth in this rider, this insurance, as to the in-

terest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

Condition One.—In case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Condition Two.—The mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

Condition Three.—This company reserves the right to cancel at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall then cease;

and this company shall have the right, on like notice to cancel this agreement.

Condition Four.—In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

Condition Five.—Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of her claim.

Attached to Policy No. ID-610926 of the General Insurance Company. Name of Company.

Issued to C. L. and R. A. Reynolds.

Agency at Filer, Idaho Dated, September 20th, 1924.

Trade Mark

STANDARD

371

July 1917.

ARTHUR E. ANDERSON,
Agent.

(Title of Court and Cause)

No. 7428

DEMURRER

Comes now the defendant above named and demurs to the complaint of the plaintiff on file herein and for cause of demurrer alleges:

I. That said complaint fails to state facts sufficient to constitute a cause of action against this defendant.

JAMES R. BOTHWELL
W. ORR CHAPMAN
Attorneys for defendant
Residing at Twin Falls, Idaho.

Filed Dec. 31, 1928.

(Title of Court and Cause)

ORDER OVERRULING DEMURRER

Minute entry of February 11, 1929.

The defendant's demurrer to the complaint was argued before the Court by Messrs. Bothwell and Chapman, defendant's counsel, and John W. Graham Esquire, plaintiff's counsel. After hearing argument, the plaintiff was granted leave to amend the complaint by inserting a paragraph to be designated paragraph number four and a half of the complaint, and the demurrer was thereupon overruled.

(Title of Court and Cause)

STIPULATION WAIVING JURY

Come now the parties above named by and through their respective counsel, and hereby waive a jury for the trial of said above entitled cause and consent to said cause being tried by the court without a jury.

Dated this 28th day of February, 1929.

W. D. GILLIS &
JOHN W. GRAHAM
Attorneys for Plaintiff

JAMES K. BOTHWELL
W. ORR CHAPMAN
Attorney for Defendant

Filed March 1, 1929.

(Title of Court and Cause)

ANSWER

Comes now the defendant above named and answering the complaint of the plaintiff on file herein admits, denies and alleges:

I

Denies each and every of the allegations of the plaintiffs complaint save and except only as specifically admitted.

II

Answering Paragraph I of said complaint defendant admits the allegations therein contained.

III

Answering Paragraph III of plaintiffs complaint defendant denies that said policy therein referred to and mentioned was for the term of five years from the said 20th day of September 1924, and in this connection alleges the fact to be that said policy of insurance was for and covered insurance from the 20th day of September 1924, for one year to-wit, to and until at or before 12 o'clock noon on or

before the 20th day of September 1925; and that at or before 12 o'clock noon on or before the 20th day of September 1925, said policy of insurance was subject to renewal only by the payment of the then current annual premium to defendant, and to continue and to extend for five years from the 20th day of September 1924, by renewal from year to year within said term by the payment of the then current annual premium to defendant at or before 12 o'clock noon on or before the 20th day of September in every year as aforesaid and not otherwise.

IV

Admits that said R. A. Reynolds and C. L. Reynolds turned said policy of insurance over to this plaintiff for the purposes alleged in Paragraph V of said complaint.

WHEREFORE, and etc.

Further answering plaintiffs complaint and by way of separate answer thereto defendant alleges:

I

That on the 20th day of September 1926, at or before 12 o'clock noon of said day the said C. L. and R. A. Reynolds so acting for themselves and for plaintiff herein, failed, refused, and neglected to pay the then current annual premium to defendant as provided in and by the terms and provisions of the policy of insurance mentioned and referred to in plaintiffs complaint.

II

That thereafter, to-wit, on or about the 4th day of October 1926, the said C. L. and R. A. Reynolds acting as aforesaid stated to and informed the agent of the defendant at Filer, Idaho, that they, the said C. L. and R. A. Reynolds, had replaced said insurance by a policy of insurance procured from the Hardware Dealers Mutual Insurance Company and that they, the said C. L. and R. A. Reynolds, then and there acting for themselves and for the plaintiff herein delivered and surrendered the policy of insurance mentioned and referred to in plaintiffs said complaint to defendants said agent at Filer, Idaho, to be cancelled and, that pursuant to the request and directions of the said C. L. and R. A. Reynolds, acting as aforesaid, said policy of insurance was thereupon duly cancelled.

III

That by reason of the facts aforesaid, said policy of insurance became null and void as of 12 o'clock noon on the 20th day of September 1926, and that the same ceased, for all purposes, to be a binding obligation or to create any liability whatsoever upon the defendant herein, since the 4th day of October 1926, and that said policy of insurance was not in force or effect at the time of the fire and loss complained of in plaintiffs complaint.

IV

That by reason of the foregoing facts plaintiff

herein is now estopped from claiming a recovery against defendant.

WHEREFORE, defendant having fully answered plaintiffs complaint herein prays judgment that plaintiff take nothing by reason of her said complaint and that it have and recover its costs and disbursements in this behalf incurred and expended.

JAMES R. BOTHWELL
W. ORR CHAPMAN
Attorneys for Defendant,
Residing at Twin Falls, Idaho

Filed March 1, 1929.

(Title of Court and Cause)

MEMORANDUM OPINION

July 1, 1929

W. D. Gillis and John W. Graham, Attorneys for Plaintiff.

Bothwell & Chapman, Attorneys for Defendant.

CAVANAH, DISTRICT JUDGE:

The question arising upon the record is whether the plaintiff, as mortgagee, is entitled to recover upon a policy of fire insurance issued by the defendant on September 20, 1924, in the amount of

$10,000, covering a two-story brick building, situated at Filer, Idaho, after the same had been destroyed by fire. The owner of the premises, previous to the execution of the policy, made a mortgage to plaintiff securing the balance remaining unpaid of $12,647.00, and delivered the policy to plaintiff as further security for the debt secured by the mortgage. The defendant and the insured attached to the policy the standard form known as "mortgage clause with full contribution" executed by defendant, which provides that loss or damage under the policy shall be payable to the plaintiff, the mortgagee. On August 29, 1928, the building covered by the policy was totally destroyed by fire. At the time of the fire there was a balance of $10,313.80 due on the mortgage, and in due time plaintiff made proof of loss in the sum of $10,000. The defendant denied liability, and this action was brought to recover the full amount of the policy.

There seems to be no question under the evidence but that the amount of damages sustained by the fire exceeded the full face of the policy.

The defendant defends upon the ground that the policy became null and void as of 12:00 o'clock noon of September 20, 1926, and from that time ceased to be in force for the reason that the mortgagors, Reynolds, acting for themselves and for plaintiff, failed to pay the then current annual premium to defendant as provided in the policy, and that about

October 4, 1926, the Reynolds informed the agent of the defendant that they had replaced the insurance by a policy procured from another company, and at the time while acting for themselves and for plaintiff, delivered and surrendered the policy to the defendant to be cancelled, which was done.

The provision of the mortgage clause which is pertinent here as providing for loss or damage to be paid to the plaintiff, provides that the interest of the mortgagee in the insurance shall not be invalidated by any act or negligence of the mortgagor, or owner of the premises, and in case of such neglect of the owner or mortgagor to pay any premium due under the policy, the mortgagee, shall, on demand, pay the same, and that the defendant company reserves the right to cancel the policy at any time as provided by its terms, but it shall continue in force for the benefit of the mortgagee for ten days after notice to the mortgagee of such cancellation.

The controlling questions would seem to be, was R. A. Reynolds, one of the mortgagors, after the clause was attached to the policy, authorized to cancel the policy on October 4, 1926, and if not was it a five-year policy, or a policy for one year to be renewed only upon payment of premium in the manner provided in the mortgage clause?

A review of the testimony discloses that in April, 1924, the time when plaintiff left Filer, Idaho, for

California, where she remained until after the property was destroyed by fire, the premises were insured, and before leaving Reynolds agreed with her to carry the insurance on the building at all times for the amount of $10,000. The policy then in force expired April 20, 1924, and Reynolds at that time took out the policy in question, and paid the annual premium until Sept. 20, 1926, and the defendant company attached thereto the mortgage clause. No demand was ever made on plaintiff to pay the premium becoming due on Sept. 20, 1926, or any premium thereafter, or notice given to her that the premiums had not been paid or that the policy had been cancelled by the defendant. At the time the policy was written and the mortgage clause attached, Reynolds requested the agent of the defendant to place it in the safety deposit box of plaintiff at the First National Bank of Filer, which Reynolds says the agent then agreed to do. The policy was not taken to the bank, but was thereafter found in the possession of the agent of the defendant, marked "cancelled." There is some testimony that the policy was secured from Reynolds, and in response to a letter of Sept. 21, 1926, of the agent of the defendant, enclosing a renewal certificate of the policy and requesting payment of the premium then due, he stated that the policy had been placed "by Hardware Mutual" and to cancel it, and that there was found in the office of the agent of the defendant a record reciting that the policy was cancelled October

4, 1926, but says that when he wrote the response he had in mind another policy. It is clear that the relation existing between plaintiff and Reynolds was that of mortgagor and mortgagee, with the understanding that Reynolds would carry the insurance on the building at all times, and the defendant had knowledge of that fact, as Reynolds paid the first two years' annual premiums and requested the mortgage clause to be attached to the policy, which informed the defendant that she held a mortgage on the premises, and in case of cancellation of the policy by reason of non-payment of premium, or otherwise, by the mortgagor, she should be notified and given time to protect her security with insurance as provided in the mortgage clause.

The first conclusion that arises from the dealings between the plaintiff and Reynolds is that he, as mortgagor, arranged with the defendant for the insuring of the premises, with no authority given to him to cancel the policy. The character of the agency, if any existed, is a disputed issue of fact, and presents the question as to whether the scope of authority conferred upon Reynolds was large enough to embrace all purposes connected with the placing of the amount of insurance. As has been said, we have here a situation where Reynolds, the mortgagor, had secured the insurance from the defendant with the mortgage clause attached to the policy for the protection of plaintiff's mortgage, and when that was done the defendant company agreed,

by attaching the mortgage clause, to deal with her as mortgagee in the manner provided in the mortgage clause before the policy could be cancelled or forfeited. The evidence indicates the absence of any desire upon the plaintiff's part to empower Reynolds by his voluntary act to create a situation giving him authority to cancel the insurance, but merely requested that the property already insured be kept insured. The mere fact that Reynolds may have had possession of the policy and requested its cancellation would not be sufficient to constitute authority from the plaintiff to cancel the policy, in the face of the provision in the mortgage clause requiring the company to give the mortgagee notice of such cancellation, which was intended to guard against such act of the mortgagor and for the protection of the mortgagee so that she could keep the property insured for the protection of her loan; otherwise the provision in the mortgage clause requiring the insurer to deal with the mortgagee would be of no avail. The neglect and acts of the morgtagor and the insurer left the plaintiff without knowledge of the cancellation of the policy and unprotected, which the defendant had expressly agreed not to do by the provision in the mortgage clause. The mortgage clause became a separate contract between the plaintiff and the defendant, and she having a large loan on the property was entitled to have the insurer comply with its terms. So I am unable to find from the evidence sufficient testimony

to convince me that the plaintiff authorized Reynolds, the mortgagor, to act for her in cancelling the policy, even if he did so, or that the acts of Reynolds were sufficient to bind her in that regard. The mere fact that the mortgagor agrees to insure the mortgaged premises, and thereafter directs the insurer to cancel the policy, in face of the provision contained in the mortgage clause requiring the insurer to notify the mortgagee of any cancellation or default in payment of premium, does not grant him authority to cancel it, unless that authority is plainly and unequivocally conferred or is waived by the mortgagee. The authority of the agent is determined by the terms of the request made by the principal. A case analogous to the present one is City of New York Ins. Co. v. Jordan, et al., 284 F. 420, where the court said (syallabus): "An agent to procure insurance is not authorized to cancel it unless that authority is plainly conferred, and it is not plainly conferred by a request by the owner of property already insured that it be kept insured and to keep him insured at any time any company cancelled a policy." It is now settled that "an agent to procure insurance is not from that engagement alone authorized to effect a cancellation of the policy."—Michelson v. Franklin Fire Insurance Co., 147 N. E. 851; McDonald v. North River Insurance Co., 36 Ida. 638; Lauman v. Concordia Fire Insurance Co., 195 Pac. 951. Nor is the mortgagor who was to carry insurance at his expense under an

agreement between him and the mortgagee authorized to cancel it or the insurer to declare it cancelled without giving the mortgagee notice and demanding payment of the premium as provided in the mortgage clause, for if such were not the case the mortgage clause would be of no protection to the mortgagee against the negligent acts of the mortgagor. The phrase "to carry insurance at all times on the premises by the mortgagor" means nothing more than to secure insurance, and does not carry with it the general authority sometimes granted to an agent or broker to do everything necessary to effect the insurance and terminate it.

The objection that the plaintiff should not recover because the policy is one for one year with the privilege of continuing the insurance from year to year during the term of five years may be disposed of briefly. It is urged that by that provision of the policy the company agreed to insure the applicant for a term of five years from year to year, and in such case the option is left with the insured as to whether he wishes to continue or renew the policy or withdraw. The essential provision of the policy necessary to a consideration of this question reads as follows:

> "Amount $10,000.00 Rate $1.68 Premium $130.40
>
> IN CONSIDERATION of the stipulations herein named and of One Hundred Thirty and

> 40/100 Dollars First Annual Premium, and by the payment of the then current annual premium to this Company, at or before 12 o'clock noon, on or before the 20th day of September in every year, renewing from year to year within said term, does insure C. L. and R. A. Reynolds for the term of five years from the 20th day of September, 1924, at noon, to the 20th day of September, 1929, at noon, against all direct loss or damage by fire except as hereinafter provided. * * * * *"*

It seems clear by the above provision that the policy was a five year term policy for $10,000, payable upon loss or damage by fire. The premium was payable annually in advance. The first premium of $130.00 was paid for the year commencing Sept. 20, 1924, and for subsequent years to Sept. 20, 1926. The expression in the policy "does insure C. L. and R. A. Reynolds for the term of five years from the 20th day of September, 1924, at noon, to the 20th day of September, 1929, at noon" makes it clear that the policy is one for a term of five years and continues in force during that period, provided the annual premiums are paid in advance at or before twelve o'clock noon of September 20th in each year. If the insured chooses to pay the premium each year in advance, the company was obligated to carry the insurance for a term of five years, and it was only subject to termination if the annual premium was

not so paid. Millar v. West. Union Life Inst. Co., (Wash) 180 Pac. 488.

This construction was no doubt the intention of the parties, as we find indorsed by the company on that part of the original policy produced, "Expires Sep. 20, 1929," and at the top of the second page of the agent's record, Exhibit "3", in a summary of the contents of the policy, the language "Term five years. Effective Sept. 20, 1924." The provisions of this policy are similar to the provisions found in life insurance policies, and it is generally held as to those policies that where a term is expressed for life or a definite number of years the policy is a continuing contract for the term therein expressed, subject only to forfeiture for non-payment of premiums. In the case of McMasters v. New York Life Ins. Co., 78 F. 33, the court said: "A life policy, delivered upon payment of the first year's premiums, is a continuing contract for the life of the insured, subject to be forfeited for non-payment of premiums, and not merely a contract for a year, renewable by payment of subsequent premiums."

There does not seem to be any ambiguity in the language contained in this policy, as it seems clearly to convey the idea that the parties intended the policy to be for a term of five years and to remain in force during that period as long as the annual premiums are paid in advance as provided therein.

A liberal construction should be placed on contracts of insurance to uphold them, as they are prepared by the insurer and the conditions contained in them which create forfeitures will be construed most strongly against the insurer. Haas v. Mutual Life Ins. Co., 121 N. W. 996. The payment of the annual premium is only a condition subsequent to the continuation of the policy, and the non-performance of which may incur a forfeiture of the policy or may not, according to the circumstances, and it is always open for the insured to show a course of conduct on the part of the insurer which gave the insured reasonable ground to infer that a forfeiture would not be exacted. Thompson v. Insurance Co., 140 U. S. 252. So recognizing this principle the court should look further than the provisions of the policy to ascertain if the insurer has by its conduct permitted the mortgagee to pay the premium upon demand and notice, if default is had by the insured, and if so such contract or course of conduct should be considered, together with the original policy, in order to determine if the policy was at the time claimed forfeited for non-payment of premium. As has been said, when the policy was issued by the company a mortgage clause was attached, executed by the company, and was made a separate contract with the plaintiff mortgagee to the effect that loss or damage, if any, under the policy, shall be paid to the plaintiff mortgagee as her interest may appear, and the policy shall not be invalidated by any

act or neglect of the mortgagor, and in case the mortgagor shall neglect to pay any premium due under the policy the mortgagee shall, on demand, pay the same, and the company reserves the right to cancel the policy at any time as provided by its terms, and in such case it shall continue in force for the benefit only of the mortgagee for ten days after notice to the mortgagee of such cancellation, and shall then cease.

These provisions of the mortgage clause of the contract, as we have seen, were not complied with by the company. There was no notice given to plaintiff of the neglect of the mortgagor to pay the premiums, or demand made upon her by the company to pay the same, or the ten days notice required to be given to her for the cancellation of the policy. In fact, she being in California at the time of the default in payment of the premiums had no knowledge of it, or that the policy was cancelled by the company, until after the property was destroyed by fire when she was then informed for the first time. She had a right to assume that under the provisions of the contract she had with the company the premiums had all been paid promptly and no cancellation was claimed by the company. Had the company complied with these terms of the mortgage clause contract, she could have protected her loan by either acquiring the mortgagor to secure other insurance, or done so herself. That was the purpose of the mortgage clause contract. The company

failing to so comply with its contract with her becomes liable under the policy for the amount of the loss and damage occasioned by the fire in the sum of $10,000 principal, and interest thereon from the date of its denial of liability, October 16, 1928. Intermountain Ass'n. of Credit Men v. Milwaukee Mechanics Ins. Co., 44 Ida. 491.

Accordingly judgment, with costs, may be entered for plaintiff.
Filed July 1, 1929.

(Title of Court and Cause)

JUDGMENT

This cause having come on regularly on the 29th day of April, 1929, the issues in this action being brought to trial before Honorable Charles C. Cavanah, United States District Judge, at a term of this court held at Boise, Idaho, the plaintiff appearing by her attorneys, W. D. Gillis and John W. Graham, and the defendant by its attorneys, Messrs. Bothwell & Chapman, a jury being waived, and the court having heard the allegations and proofs of the parties, and the arguments of counsel for said parties, and having taken the decision in said cause under advisement, and after due deliberation having duly made its decision in writing in favor of the plaintiff and against the defendant, now on said decision and

on motion of W. D. Gillis, one of plaintiff's attorneys,

IT IS ORDERED, ADJUDGED AND DECREED, That plaintiff, Rosa M. Allen, recover of the defendant, General Insurance Company of America, a corporation of Seattle, Washington, the sum of $10,000, together with interest thereon from the 16th day of October, 1928, to this date at the rate of seven per cent (7%) per annum, or the sum of $495.80, less a credit in the sum of $302.36, being premium and interest on policy for two years to July 2nd, 1929, leaving a net balance due from the defendant to the plaintiff herein for principal and interest in the sum of $10,193.44, together with costs of this action taxed at $124.40, or a total judgment in the sum of $10,620.20, and have execution therefor.

Judgment signed and entered this 2nd day of July, 1929, at 4 P. M.

Filed July 2, 1929.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

ORDER CORRECTING JUDGMENT

A judgment was entered in the above entitled case on the 2nd day of July, 1929, in the sum of $10,-

000.00, together with interest thereon from the 16th day of October, 1928, to the 2nd day of July, 1929, at the rate of 7% per annum in the sum of $495.80, and it appearing to the court that the annual premium on the policy of insurance in question due September 20, 1926, and that the annual premium due September 20, 1927, in the sum of $130.40 for each year had not been paid by the mortgagee or the mortgagor herein and that the defendant is entitled to a credit on said judgment and interest for said two years' annual premium with interest from the date that said annual premium fell due to July 2nd, 1929, at 7% per annum in the sum of $302.46, principal and interest, and a mistake was made in not allowing said credit upon said amounts so found due the plaintiff and that the judgment so entered on the 2nd day of July, 1929, should have contained a provision for said credit in the sum of $302.36 and that said judgment should be corrected in that regard by this order as of the date of July 2nd, 1929:

It Is Therefore Ordered and Adjudged that the judgment entered in said above entitled cause on the 2nd day of July, 1929, be, and the same is hereby, amended by inserting after the words "on the sum of $495.80" on the second line of the second page of said judgment the following: "Less a credit in the sum of $302.36, being premium and interest on policy for two years to July 2nd, 1929, leaving a net balance due from the defendant to the plaintiff

herein for principal and interest in the sum of $10,193.44."

It Is Further Ordered and Adjudged that said amendment shall take effect as of July 2, 1929, the date of the entry of said judgment.

Dated in open Court this 31st day of July, 1929.

CHARLES C. CAVANAH
District Judge

Filed July 31, 1929.

(Title of Court and Cause)

BILL OF EXCEPTIONS

Be it remembered that the above-entitled cause came on for hearing before Honorable Charles C. Cavanah, Judge, a jury having been waived in writing, at Boise, Idaho, on Monday, the 29th day of April, 1929, John W. Graham, Esq., of Twin Falls, Idaho, and W. G. Gillis, Esq., of Boise, Idaho, appearing as attorneys for plaintiff, James R. Bothwell, Esq., of Bothwell & Chapman, of Twin Falls, Idaho, and Ralph Pierce, Esq., of Seattle, Washington, appeared as attorneys for defendant. After opening statements by counsel, the following proceedings were had:

Whereupon, R. A. Reynolds was called as a witness on behalf of the plaintiff and being duly sworn

testified upon direct and cross-examination as follows:

DIRECT EXAMINATION

My name is R. A. Reynolds. I live at Twin Falls, Idaho. My brother is C. L. Reynolds. I am interested with my brother in the ownership of this property covered by this insurance. The building was built upon Lots 28 and 29, Block 14, Filer. We were the owner of these lots in 1916 and are still the owner of the property. Exhibit No. 1 is a warranty deed issued by Henry Jones and Wilmoth Jones to Richard A. Reynolds and Charles L. Reynolds covering Lots 27, 28 and 29, in Block 14, in the Village of Filer. Exhibit "1" attached hereto is a part of this Bill of Exceptions and was admitted in evidence. We constructed a brick building on Lots 28 and 29, Block 14, Filer, in 1916. Exhibit "2" are the plans of the building. The building was 50 x 125 feet. At the time the building was built the ground floor was used for a garage. I made an oral application to the defendant company for insurance along in the year 1924. Arthur E. Anderson was the agent representing the company at that time. I think he left about a year after this policy was issued. F. C. Graves of Filer succeeded him as agent or representative of the company. The application for insurance was made on September 20, 1924. I kept records of insurance on the building. Those records were burned up. The construction cost of the

building was $35,000. The size of the policy that I applied for was $10,000. Whereupon, the following proceedings were had:

"MR. GRAHAM: Now I will ask that the defendant produce the original policy in accordance with the order made on the 22nd day of April.

MR. BOTHWELL: We now tender counsel as much of the original policy as we have. The other portion of it in the regular course of business—

MR. GRAHAM: We object to any explanation made at this time as to where the policy is. They were given the opportunity—

MR. BOTHWELL: I would like to complete my statement.

THE COURT: You may complete your statement and I will pass on it afterwards.

MR. BOTHWELL: We now tender to counsel in accordance with the order so much of the policy as we have and state that in the general course of business the other portion of the policy is destroyed. We only have this portion of the policy and will state that a copy of the policy which is attached to the complaint contains the other portion of the policy as it was written at the time, together with the original policy which we can now tender.

MR. GRAHAM: We still ask the enforcement of the order. We are entitled to the original policy.

THE COURT: He says it has been destroyed before this order was made.

MR. BOTHWELL: Yes, we have produced all we have of it.

MR. GRAHAM: It is too late to make an explanation of this kind. They were given an opportunity to show cause why it could not be produced. They put us to the expense of making the application for the order and we insist upon the production of the evidence.

MR. BOTHWELL: If the Court please, as I understand, we are only required to produce that which we have.

MR. GRAHAM: We ask that the penalty provided by Rule 96 of this court be applied and judgment by default be entered against the defendant.

MR. GRAHAM: After reading the rule. Under that rule plaintiff now moves for judgment by default against them for non-production of that evidence as required by the order of this court made and entered on the 22nd day of April, 1929, copy of which is now in the files of this court.

MR. BOTHWELL: As I understand the interpretation of the rule, if the court please, we are required to produce that which we have and the purpose of the rule is, that at the trial if they are unable to go ahead and make proof of the case, then they could simply move for default, but judgment by default must be based upon some reason, must be some reason for it and that is, that they could not prove their case, and that we had something that we were withholding from them.

THE COURT: There are always limits in invoking these rules. You are not injured and you are not required to prove that instrument by secondary evidence. The rule says the court may do so, it does not say must, if you are injured, taken by surprise or deprived of proving your case, then your position would be correct.

Further,

THT COURT: You understand my interpretation of this rule. You are entitled to judgment if you cannot prove your case.

MR. GRAHAM: Let me say what the admissions are. It may be stipulated and agreed between counsel for the respective parties that on the 20th day of September, 1924, the defendant company made, executed and delivered to R. A. Reynolds and C. L. Reynolds a policy of insurance for $10,000., upon a two story composition roof brick building situated on Lots 28 and 29, in Block 14, in the city of Filer, and that said policy had attached thereto the standard mortgage clause payable - - - mortgagee clause, payable to Rose M. Allen, together with building form rider.

MR. BOTHWELL: Let me suggest Mr. Graham, would not it be much more simple if I just admitted for the defendant that the copy of the policy attached to the complaint is a true copy of the original policy in question? I rather hesitate to stipulate about execution, delivery, etc.

THE COURT: That contains the mortgagee clause?

MR. BOTHWELL: Yes.

MR. GRAHAM: I want to show the policy was executed and delivered by the defendant company.

MR. BOTHWELL: Mr. Reynolds testified to that.

THE COURT: I understood him to say that he got this policy from the agent of the company. There is no issue in regard to that.

MR. BOTHWELL: There is no issue as to Mr. Anderson being agent of the company and Mr. Reynolds getting the policy.

THE COURT: I do not know as there is anything further to stipulate.

MR. GRAHAM: It handicaps us some in not having this exhibit here so that we can formally introduce it. It is hard to tell in a stipulation of this kind whether something is left out.

THE COURT: The form is attached to the complaint.

MR. GRAHAM: Have you any objection to stipulating that the policy was executed and delivered in the form of Exhibit "A"?

MR. BOTHWELL: We have no objection to admitting—we do not wish to be captious, that the copy of the policy attached to the complaint is a copy of the original policy and admitting Mr. Reynolds' testimony as it stands about the delivery, and

we raise no question as to Mr. Anderson being the agent of the company.

THE COURT: As I understand, the record shows that Exhibit "A" attached to the complaint is now admitted by counsel as a true and correct copy of the original policy here in dispute.

MR. BOTHWELL: That is correct, as I understand it.

THE COURT: And that the explanation—the admission counsel makes in open court, is that the original has been lost.

MR. BOTHWELL: Has been destroyed, yes.

THE COURT: It is admitted that Exhibit "A" is a true and correct copy of the original policy upon which this suit is brought?

MR. BOTHWELL: Yes.

THE COURT: And it contains the mortgagee clause attached to it?

MR. BOTHWELL: Yes."

Whereupon the witness R. A. Reynolds resumed.

"MR. GRAHAM:

Q. Was any policy delivered by the agent Mr. Anderson to you?

A. Yes. The policy was taken out in Mr. Anderson's office. I left it with Mr. Anderson with instructions to put it in the bank for Mrs. Allen to be placed in her safety deposit box. My instructions were that when the policy was issued it was to be put in the First National Bank of Filer as he had done with previous policies. I do not know

whether the policy was actually delivered by Mr. Anderson to the bank officials. I didn't see the policy after that at any time. The first year's premium was paid to Arthur Anderson. The premium for 1925, due September 20, 1925, was paid to F. C. Graves, on March 2, 1926, as shown by original and duplicate checks, Exhibits 4 and 5, admitted in evidence, copy of which exhibits are attached to this Bill of Exceptions and made a part hereof. The item of $130.40, which appears on plaintiff's exhibit 5, is the amount of the premium paid upon this policy. Attached to Exhibit 5 is a statement for insurance premiums rendered by F. C. Graves, and which is made a part of this Bill of Exceptions. On September 20, 1924, my brother, C. L. Reynolds, and I, were indebted to Rose M. Allen, plaintiff in this case. She held security on this property for this building for that indebtedness. Whereupon, the following questions were asked and answers given and objections made:

"MR. GRAHAM: Q. At the time of the execution of the note and mortgage was there any agreement between you and Mrs. Allen in regard to carrying insurance on the property?

A. Yes.

MR. BOTHWELL: I object to that. It is now shown that there was a mortgage, an instrument in writing, and that would be the best evidence.

THE COURT: The mortgage probably contained the condition to the insurance.

MR. GRAHAM: I do not think it contained the requirement as to the insurance, but at the time the note and mortgage were executed, and contemporaneous with it, he agreed to give additional security in the way of insurance.

THE COURT: He may answer.

A. I had an agreement with Mrs. Allen that I would carry $10,000. insurance at all times on the building, at least.

Q. This policy was taken out in accordance with that agreement?

A. With the mortgagee clause attached to it, yes."

The building was destroyed by fire on August 29th, 1928, at about 2 o'clock in the morning. I do not know the cause of the fire. The building was totally destroyed. There was no salvage. The reasonable rental value of the property was $2500., a year at the time it was destroyed. I was looking after this business at Filer myself. My brother C. L. Reynolds was not looking after any part or portion of the business. We were not in business at Filer at the time of the fire. We had our hardware store in this building some two years prior to the fire. The building was worth $24,000., or $25,000., at the time of the fire.

CROSS EXAMINATION

In 1917 we were in the hardware business; also the automobile business, I believe.

Whereupon request for a stipulation as to exceptions was made and allowed by the court as follows:

"MR. GRAHAM: May we have a stipulation that all adverse rulings of the court may be deemed excepted to?

THE COURT: The record may show that to all adverse rulings of the court each party may be deemed to have an exception."

This building was constructed in 1916, improved in 1917. The Filer Hardware Company afterwards was incorporated. I do not think we had another deed to this property prior to the deed of this deed, Exhibit 1. That property was not taken into the Filer Hardware Company. It was occupied by the Reynolds Motor Company. The lower floor was used as a garage. I had known Mr. Anderson since about 1915. I became indebted to Mrs. Allen about 1919. The original amount was approximately $13,000. The debt was for stock owned by her husband in the Filer Hardware Company which I purchased. Mrs. Allen's husband had 100 shares. I gave her notes and a mortgage on this building as security. I had most of the dealings with Mrs. Allen myself, with she and her attorney, Mr. Hazel of Twin Falls. The mortgage was given in Mr. Hazel's office at Twin

Falls. We were talking over the question of insurance at the time the original mortgage was given to Mrs. Allen. Mr. Hazel thought that there should be insurance kept on the building—additional security—and I agreed with him. In attempting to carry out our understanding we took out the policy immediately and had the clause attached to the policy in Mrs. Allen favor for $10,000.00. This was in 1919. I do not remember the company. Mr. Anderson was the agent. I think Anderson must have attended to that insurance personally. I do not know, that dates back considerably. I am sure that I took the first policy with Mr. Anderson. There was a policy taken, I am quite sure of that. The policy was put in Mrs. Allen's box at the First National bank. I presume that the policy was put in the bank box by the agent, whoever he was. Some years she did. I do not know who put the policy in the box in 1919. Mrs. Allen was living at Filer in 1919 at the time this policy was taken out. I believe she left Filer soon after that. That was just a one year policy, because this was the first five year policy I had ever taken out. The policies previous to the policy in question were all one year policies. Beginning with 1919, up until the time I took this one out, I took a policy each year for $10,000. I do not know the agency that I took out the original policies with, but Mr. Anderson had one or two of them, may be more. Prior to 1924 the policies were always put in Mrs. Allen's safety deposit box at the

bank, so far as I know. Those were the instructions I left with the agents at the time the policies were written. My instructions to Mr. Anderson in 1924 were to do with this policy as he had with the others to put it in Mrs. Allen's bank box. Whether or not he did that I do not know. I saw the policy that was written by Mr. Anderson in 1924 in his office. I recall the incident very clearly, because he had just taken over the agency and explained to me how much cheaper the premiums would be, because they sort of gave back refund on premiums each year. It was a mutual proposition. He showed me that it was a cheaper policy than the ones I had been carrying. It was also a five year policy and I would not need to be bothered with it. It was a much better policy and that is the reason I—I looked it over some and read it over some at the time; after he showed me the policy after it had been written and read over, I do not know what Anderson did with the policy, I never saw the policy after that time. The amount, $130.40, appearing on Exhibit 5, is the premium for the year 1925 on this particular policy. At the time this policy was taken out in 1924 we had our hardware and implement stock in the building. The hardware and implement stock remained there until about 1926. I think there has been a change in rates and a change of companies between 1919 and 1924 in the insurance of this building. I do not know the names of the companies. I never had access to Mrs. Allen's box in the First National

Bank and never had any dealings with her except in connection with borrowing this money and paying interest.

Whereupon, Raymond Graves was called as a witness on behalf of plaintiff, and being duly sworn testified upon direct examination as follows:

RAYMOND GRAVES—DIRECT EXAMINATION

My name is Raymond Graves. I am the son of F. C. Graves and am the agent of the defendant company at Filer, Idaho, now, and have been, since May 1924, I believe. We were not the agent at the time this policy was delivered, September 20th. Arthur E. Anderson was the former agent. He moved away and we purchased his business. The actual agent *after was* purchased his business at one time was Raymond Graves. Later, about November, a little over a year and a half ago, it was F. C. Graves and Son, up until that time, and until we took the business over, I was the agent; plaintiff's Exhibit 3, is the agent's copy of the policy issued by Arthur E. Anderson to C. L. and R. A. Reynolds, covering the property on Lots 28 and 29, Block 14, sheet No. 204. This is the agent's copy. Arthur E. Anderson's signature appears on this exhibit. We got this agent's record from Anderson in 1925. Whereupon Exhibit 3 was admitted in evidence. Copy of which

is attached hereto as Exhibit 3 and made a part of this Bill of Exceptions.

Whereupon Rose M. Allen was called as a witness on behalf of plaintiff and being duly sworn testified upon direct and cross-examination as follows:

ROSE M. ALLEN—DIRECT EXAMINATION

My name is Rose M. Allen. I live in San Diego, California, and have lived there five years first of June. I moved to Filer in 1906. Was there until 1920. R. A. Reynolds and C. L. Reynolds became indebted to me in 1919 for the purchase of stock in the Filer Hardware Company. They gave notes and a mortgage to secure this indebtedness, Exhibits 6, 7, 8 and 9 are notes given, Exhibit 10 is the mortgage. Whereupon, Exhibits 6, 7, 8, 9 and 10 were admitted in evidence, copies of which are annexed hereto and made a part of this Bill of Exceptions. The endorsements on the backs of the notes as to the payment of interest show the correct amounts of interest paid, together with the dates of payment. The total amount of principal and interest due and unpaid up to May 1st, 1929, is $10,675.82. At the time this mortgage was made and executed Mr. Reynolds was to carry insurance for my security; on September 20, 1924, I was residing at San Diego. I left Twin Falls in April, 1924. Whereupon, the following questions were asked and answers given:

"MR. GRAHAM:

Q. Now was there anything said by you or any instructions given to Mr. Reynolds in regard to the policy of insurance. What was done with it?

A. Yes.

Q. State what they were?

A. I instructed Mr. Reynolds that the policy should be taken to the First National Bank at Filer.

Q. What was to be done with it?

A. Placed in my bank box.

Q. You have a safety deposit box in which you kept papers in the First National Bank of Filer?

A. Yes.

Q. Do you know whether or not the policy was actually delivered to the bank and placed in this safety deposit box?

A. No.

Q. Did you ever see the policy personally?

A. No, sir."

I first learned that the building had been destroyed by fire about the 30th day of August, 1928. I learned this through a telegram from my brother in Twin Falls. I wired him that the policy was in the First National Bank in my box and received further word from him that they could not find the policy. I came to Filer three weeks later to look for the policy. I went to the bank but did not find it there with the papers in my safety deposit box. I then went to F. C. Graves' office and had a con-

versation with Raymond Graves, in which I said, "What about my insurance money?" He said, "that the policy had been canceled," and I said, "Who cancelled it," and he said, "Reynolds, and I said, "Why did you not notify me," and he said, "that the policy had been canceled at that time," and I went over to Mr. Gillis' office and employed him to represent me, in filing proof of loss. I stayed in Filer about a week. No part of the loss has been paid to me. No demand was ever made upon me for the payment of any premium on this policy, either by Mr. Graves and Son or the defendant company. I was never notified that the premiums had not been paid. I was ready and willing to pay the premiums if demand had been made upon me and I was in a financial position to pay the premiums if demand were made.

CROSS EXAMINATION

I went to California about April 1st, 1924. My husband's name was George F. Allen. He became interested in the Filer Hardware Company in 1917. He died November 26, 1918. He had stock in the Filer Hardware Company at the time of his death. I did not assist in his business affairs with the Filer Hardware Company. I knew Mr. R. A. Reynolds during the time my husband was a member of the Filer Hardware Company. I dealt with R. A. Reynolds in disposing of my husband's interest in the

Filer Hardware Company. Mr. Hazel, an attorney of Twin Falls, represented me. I recall the incident of the time the mortgage was signed in Mr. Hazel's office. Whereupon, the following questions were asked and answers given:

"MR. BOTHWELL:

Q. What was said, if anything, about insurance upon the building at that time?

A. At all times there was to be $10,000., insurance policy carried, with mortgagee clause attached, in my interest.

Q. That was the general conversation—what was said and —

A. Yes.

Q. An insurance policy of $10,000., was to be carried at all times?

A. Not less than $10.000."

I was living at Twin Falls at that time. Lived there until 1924. My attorney attended to filing the mortgage for record for me. I was present when Exhibits 6, 7 and 8 were signed and saw them signed. After these instruments were signed I put them in my bank box in the First National Bank at Filer, Idaho. I did that the very next day after they had been taken care of, as soon as the bank opened the next morning. If the date is June 20, 1919, then I put the notes in the bank the next day, on June 21. Other valuable papers were put in the

bank along with Exhibits 6, 7 and 8, at that time. There were two other notes of the same denomination as these three, making five original notes. They were all put in the bank by myself, in the bank box by me. Mr. Hazel filed the mortgage for record. I took the mortgage to my box with the rest of the things. I do not know when the mortgage was recorded. It was put in the bank box along with the other papers by me. I received plaintiff's Exhibit 9 on August 26, 1921, while I was living at Twin Falls. I received this note in Mr. Reynolds' office in the building that was burned. He gave me this note at that time after he made the payments which I have referred to. I put this note, Exhibit 9, in my bank box in the First National Bank of Filer. The first insurance policy was given to me at the same time when the notes were made out. I put that insurance policy in my box. It stayed there until canceled. I took it out of my box because it was canceled. The particular policy that I got from Mr. Hazel expired in September, 1924. No, the first policy that was taken out did not expire in September, 1924, it was just from year to year. He took only a year's each time. When the first insurance policy expired Mr. Reynolds applied for new insurance and gave the policy to me. I put the policies in my safety deposit box. I had four policies before September 20, 1924, as near as I can recall. The last one expired somewhere's around September 20, 1924. I moved to California in April 1924. I re-

turned to Idaho in June, 1927, and remained three weeks. I had no business dealings with Mr. Reynolds at any time in June, 1927, outside of paying my interest. I talked to him about paying the interest. He was not able to take care of it until October. In June, 1927, I talked to Reynolds about paying the interest which was then past due. I was here about three weeks. I had no other business dealings with Mr. Reynolds at that time in reference to these notes or this mortgage. I simply tried to collect the interest. I wanted the interest paid. I was finally paid in October of that year. Whereupon, the following questions were asked and answers given:

"MR. BOTHWELL:

Q. Now at the time you were here in June, 1927, were you in the First National Bank building at Filer?

A. Yes.

Q. And did you open your safety deposit box at that time?

A. Yes.

Q. Did you remove any papers from the box at that time?

A. No.

Q. You took nothing from the box?

A. No, sir.

Q. Did you inspect the papers that were in the box at that time?

A. No sir, I had no occasion to.

Q. Why did you open the box?

A. Merely to get out my notes to have any interest to apply—he had paid—on the back of them.

Q. He did not pay any interest until October, 1927.

A. I had other dealings. I was selling a home on the east side in Twin Falls at that time.

Q. Did you have any papers in the box with reference to your home at that time?

A. A deed.

Q. Do you remember removing the deed from the box at that time?

A. Yes.

Q. Did you complete the transaction at that time for the disposal of your home?

A. Yes.

Q. Do you remember removing anything from the box at that time excepting the deed?

A. No sir.

Q. Is your memory distinct upon that question?

A. Yes.

Q. After you went back home when next did you return to Idaho?

A. Not until September 20, 1928.

Q. Was that after the fire?

A. Yes."

I opened my box in the First National Bank at Filer at that time. I inspected the papers that were in the box, but removed none from the time I moved

down to San Diego in April, 1924, until June, 1927, when I returned to Idaho. I left my key to my safety box in the bank with Mr. Shearer, so that if I wanted at any time any papers taken from my box he could send them to me. I remember receiving notes from Mr. Shearer that I asked for during that time. They were notes pretaining to another transaction. After I went back in 1927 Mr. Shearer still had a key to my box. He had the key at all times that I resided in San Diego. He sent me no papers after June 1927. He sent me two notes during the time that I was at San Diego. When I went down to San Diego in 1924 the insurance policy on this property was in my safety deposit box. When I inspected the papers in the box in September 1928 there were other insurance policies that I had in the box. I do not remember how many policies were there. There were other insurance policies covering Lots 28 and 29, Block 14, in Filer, and there were other canceled policies. There were some old policies in there. There were some old policies in there covering this same building, canceled policies. I destroyed them, when I came back in September 1928. No one was present when I destroyed them. I put the first policy in the box myself. The policies that I found in the box when I came back in September 1927 were put there by myself and there were four as near as I can recall. In April 1924, guess four policies were in the box. I got these policies from Mr. Reynolds. I put them

in the box myself. Reynolds sometimes handed me the policies, if it was convenient, other times he would take them to the bank, or, perhaps, the agent would taken them over for me. By the agent I mean Arthur Anderson. I cannot recall the number of times that Anderson took the policies to the bank. I think I took the policies there two or three times. Mr. Reynolds took a policy to the bank. I do not know how many times. Reynolds ordered the policies occasionally. I did ask Mr. Anderson to see that it was taken care of. When I went away in April 1924, Reynolds said to me that he was taking out a new policy, a five year policy, for $10,000., with the mortgagee clause payable to me. I told him to take it to the First National Bank of Filer to give it to Shearer to put in my box. That was the first part of April 1924. This conversation took place between me and Reynolds at his place of business in Filer. No one was present except Mr. Reynolds and myself. That is Mr. R. A. Reynolds who testified here. He said he was going to take the new policy out with the General Insurance Company of America. He did not tell me what the rate would be or what it would cost him. He told me the policy would be for $10,000. I had no correspondence with Reynolds after April, 1924, prior to the fire in 1928. I had no correspondence with Mr. Shearer about insurance during that time. The question of insurance did not come up after April 1924 until after the fire, and then I heard of it first by wire from

my brother. He wired that the Roof Garden had been destroyed and where was the policies. I wired that the insurance policy was in my bank box in the First National Bank. He replied that him and Shearer had gone through the box and that the policy was not to be found. Then I came up in September, 1928, and went to Mr. Graves' office, talked with Raymond Graves, asked him about my insurance money. He said the policy was cancelled. I said, "who cancelled it," and he said, "Reynolds," and I said, "Why didn't you notify me," and he said, "he left that for Reynolds to take care of." I said, "you will have to admit that it was poor business on your part that you didn't notify me." After that I went to see Mr. Gillis.

RE-DIRECT EXAMINATION

When I spoke of these old policies being canceled I meant expired. No old policies were canceled on account of violations that I know of. These policies that were taken out first were for one year at a time. And when they expired new policies were issued. Whereupon, the following questions were asked and answers given and objections interposed:

"Q. Did Mr. Reynolds at any time have any authority from you to go to the bank and get any papers out of your safety deposit box?

A. No, sir.

Mr. BOTHWELL: That would be a conclusion of the witness.

THE COURT: Did you give him permission at any time?

A. No, sir.

MR. GRAHAM:

Q. The only party authorized to go into your box was—

A. Mr. Shearer."

Whereupon, Guy H. Shearer was called as a witness on behalf of plaintiff and being duly sworn testified upon direct and cross examination as follows:

GUY H. SHEARER—DIRECT EXAMINATION

My name is Guy H. Shearer. I live at Filer. I am and have been engaged in the banking business at Filer, Idaho, since 1911. I am President of the First National Bank of Filer. I was first Cashier. Mrs. Allen, the plaintiff in this case, had a safety deposit box rented in the First National Bank of Filer. It was like any other safety deposit box, except until Mrs. Allen removed to California she left her key with me in order to have access to her box without making the trip. She would write up if she wanted any particular article and I would register it back to her. She had a safety deposit box in the bank ever since her husband died. They

had the same box joint at the time of his death. I have no recollection of Mr. Anderson, agent of the defendant, bringing a $10,000 insurance policy on the building in question over to the bank on or about September 20, 1924, or at any time thereafter and leaving it with me. I don't remember it. If he had of left it it would have been turned over to Mrs. Allen or put in the box. Prior to the time she left we put it in safe keeping and then when she would return she would put it in the box. I do not recall any policy being left there after she left for California in 1924. If a policy had been left there it would have been put in her box. My instructions were that if any papers were left for me to put them in her box. I never saw that $10,000 policy. After the fire her brother came to the bank and inquired in regard to the policy. He and I opened the safety deposit box to see whether or not any policy was in the bank at that time. The $10,000 policy was not in the box at that time, nor was any other live policy. Sometime along after that, about September 20, Mrs. Allen came to Filer. I was present when she made a search of the box, but I did not go through the papers during the time that I have been in business in Filer. I have become familiar with the value of business property. I was familiar with the reasonable market value of the property in question on August 29, 1928. I think, basing it upon the income of the building, it should be worth from $20,000 to $22,000. The building was a total loss.

CROSS-EXAMINATION

While Mrs. Allen was living around Twin Falls and Filer the papers that were brought to the bank were left there and held by the officers of the bank and turned over to her and she would put them in the safety deposit box. I think Mr. Anderson brought several insurance policies to the bank during that time. I could not say definitely, at least two. I believe there may have been several that he left for her. I cannot remember. It may have been Reynolds instead of Anderson. At least to my best recollection there was at least one policy left there that I know of. No policy was left there after she moved to California. My estimate of what the property was worth included the lots, as well as building, that is, the fair value.

RE-DIRECT EXAMINATION

The lots should be worth $1500.00. I took into consideration the location of the building in the town, the kind of a building it was, and the income, in fixing the value. At the time the plaintiff's brother and myself examined the papers in the safety deposit box we found several expired policies, at least two, on this building. All were expired.

RE-CROSS EXAMINATION

I do not recall the companies in which the different policies were written. I think one was the

Aetna. I do not remember the name of the agent that appeared on any of them. There were at least two policies. There must have been two.

Earl Felt was called as a witness on behalf of plaintiff and being duly sworn testified on direct examination as follows:

EARL FELT—DIRECT EXAMINATION

My name is Earl Felt. I live at Twin Falls, Idaho. I am in the building and contracting business. I have made an estimate of the cost of reconstructing the building in question that was destroyed by fire. My estimate is contained in Exhibit 11. Whereupon Exhibit 11 was admitted in evidence. The total cost, according to the recapitulated figures in my estimate is $34,608. Whereupon Exhibit 12 being notice to produce original letters and proofs of loss, containing a receipt of service by Bothwell and Chapman, attorneys for the defendant, was admitted in evidence, copy of which is annexed hereto and made a part of this Bill of Exceptions as Exhibit 12.

Whereupon, W. D. Gillis was called as a witness on behalf of the plaintiff and being duly sworn testified on direct and cross-examination as follows:

W. D. GILLIS—DIRECT EXAMINATION

My name is W. D. Gillis. I am a lawyer and attorney general of the state of Idaho. Prior to January 7, 1929, I was practicing law in Filer, Idaho. I made proofs of loss on behalf of plaintiff in this case. I called on F. C. Graves and Son on September 20, 1928. Reynolds told me that the policy had been canceled. I asked him if he had a record of it and as I recall it at that time he gave me the agent's record. He loaned me the record introduced in evidence here. I told him I was expecting to make proof of loss. I wrote, as I recall, three letters to the General Insurance Company at Seattle. I wrote the letter which is marked Exhibit 13, received the letter marked Exhibit 14, and wrote the letter marked Exhibit 15, and received the letter marked Exhibit 16. I wrote letter marked Exhibit 17, and received letter marked Exhibit 18. These letters passed back and forth between me and the General Insurance Company of America by regular correspondent of mail. Exhibit 19 is original proofs of loss made by me. Whereupon, Mr. Gillis was withdrawn as a witness from the stand and L. F. Becker was called as a witness on behalf of the plaintiff and being duly sworn testified as follows:

L. F. BECKER—DIRECT EXAMINATION

My name is L. F. Becker. I reside at Seattle. I am Assistant Secretary of the defendant company.

Exhibit 13 is a letter received from Mr. Gillis by the company. Exhibit 14 is a letter written by the company to Mr. Gillis. Exhibit 15 is a letter written by Mr. Gillis to the company. Whereupon, Exhibits 13, 14, 15, 16, 17, 18 and 19 were admitted in evidence and are annexed to this Bill of Exceptions as Exhibits 13, 14, 15, 16, 17, 18 and 19, and made a part hereof.

Whereupon, Mr. Gillis resumed the witness stand and testified upon cross-examination as follows:

CROSS-EXAMINATION—W. D. GILLIS

Mrs. Allen first came to see me on September 20, 1928, in reference to this matter. At that time I went over to see Mr. Graves and he loaned me the record that has been introduced in evidence here. Mr. Graves told me the circumstances under which the policy had been canceled. He went into some little detail, that I don't recall, except the main thing that it had been canceled. Mrs. Allen employed me to make proof of loss and to collect for her under the policy. Whereupon, the following questions were asked and answers given.

"MR. BOTHWELL:

Q. What business was carried on in this building at the time it was destroyed by fire?

MR. GRAHAM: I object to that as not proper cross-examination.

MR. BOTHWELL: He made proof of loss here.

THE COURT: Overruled.

A. My recollection is, that there was some hardware stock. I would not be sure about this hardware stock, in the basement and a sort of a garage in there, that is service repair for automobiles and a number of automobiles.

Q. There were a number of automobiles burned up in this fire?

A. Yes, sir.

Q. How many?

A. I could not tell, Judge, I was not there at the time of the fire. I had no occasion to know.

Q. You say your recollection is there were some implements stored in the basement?

A. That is my recollection. I wouldn't be sure about that. I said hardware stock, not implements, I wouldn't be sure.

Q. Consisting of what?

A. Wouldn't be sure.

Q. You would not be sure, as a matter of fact, whether there was any hardware stock in the basement?

A. No, I am not sure of that. It is my belief that there was.

Q. What was the first floor used for at that time?

A. The first floor was used, as I have said, for this repair shop and auto storage and servicing of cars.

Q. What was the upper floor used for?

A. Are you speaking of the portion that was used as a dance hall?

Q. Yes.

A. That was used for the holding of dances.

Q. How much basement was there under the first floor?

A. I could not be sure. I could not recall with any accuracy. I have not been in it.

Q. Calling your attention to the proof of loss, plaintiff's exhibit 19, subdivision "h", which reads as follows: 'By whom and for what purpose any building herein described and the several parts thereof occupied at the time of fire. First floor - - - implement stored by Filer Hardware Company." Why did you make that statement and sign it as agent for the mortgagee if, as a matter of fact the first floor was used for a garage and repairs and for these automobiles?

A. For many years it had been used as an implement store, but it was still used as an implement store and some implements were there—some implements were around there and some hardware stock.

Q. By whom was this considered as an implement store. This first floor?

A. By everybody in town.

Q. By everybody in town?

A. Yes.

Q. Well, is that the only explanation that you

can make now as to the reason why you inserted that statement in this proof and swore to it?

A. The only thing that occurs to me that I thought at all necessary.

Q. Whether necessary or unnecessary, is that the only reason?

A. That is the reason."

Whereupon, the plaintiff, Rose M. Allen, was recalled for further cross-examination and testified as follows:

ROSE M. ALLEN—CROSS-EXAMINATION

When I returned in June, 1927, I was not in the building on which I had the mortgage; that building about a block from the First National Bank building of Filer. I was in the First National Bank building of Filer in June, 1927, when I returned and opened my deposit box at that time and withdrew some papers from it at that time.

Whereupon, the following questions were asked, answers given and objections interposed and rulings made thereon:

"MR. BOTHWELL:

Q. Was this policy upon which this suit was brought in the box at that time?

A. I do not know.

Q. Did you see any policies in the box at that time—insurance policies?

A. Policies upon other insurance? Yes.

Q. As to this particular property did you say there were any policies there at that time.

A. I had no occasion to look.

Q. Would you say then whether you had occasion to look or not?

A. There was a bunch of them together.

Q. A bunch of policies together?

A. Yes.

Q. You say you do not know whether this policy was in the box at that time or not?

A. No, sir.

Q. Did you examine any policies in the bank at that time?

A. No, sir.

Q. Did you inquire from Mr. Shearer as to whether or not Mr. Reynolds had brought the policy there in 1924 and put it in that box?

A. No, sir.

Q. Did you ask Mr. Reynolds about that at that time?

A. No, sir.

Q. Did you talk with Mr. Reynolds in June, 1927, about this policy?

A. No, sir.

Q. Or about any insurance upon their property?

A. I do not recall that I did.

Q. You were talking with Mr. Reynolds about collecting interest on the notes?

A. Yes.

Q. Did you say anything to him about insurance at that time?

MR. GRAHAM: She has already answered that.

THE COURT: She said she did not recall. Sustained.

Q. Well, do I understand by that that you may have talked to him about it at that time?

A. No, sir, I did not.

Q. You looked in your box in 1927 to see whether this policy was there?

MR. GRAHAM: I object to that as immaterial, not proper cross-examination.

THE COURT: Sustained.

Q. Why did you not inquire from Mr. Reynolds about the policy at that time?

MR. GRAHAM: I object to that as immaterial and not proper cross-examination.

THE COURT: What is the purpose why she did not do this. I can't get the idea unless it is going to lead up to something else. I cannot see where it is competent now as to why she did not do this or do that. She has testified as to what she actually did. I can see how it might be competent. I do not know what you may be leading up to. It might be material under certain circumstances to ask that question. I think I will let her answer the question.

THE COURT: He is asking why you did not inquire from Mr. Reynolds about this policy in

1927. Any reason why you did not do it, if you had any?

A. I never thought of asking him.

THE COURT: That other question I think I will allow you to answer that.

MR. BOTHWELL: Will you read the question, Mr. Reporter?

Question read by reporter: Q. Why didn't you look in your box in 1927 to see whether this policy was there?

A. I just never thought of looking, that was all.

Q. You were leaving that matter, the question of insurance, to Mr. Reynolds, as I understand it?

A. Yes."

RE-DIRECT EXAMINATION BY MR. GRAHAM

"Q. The last question asked you was, that you left the matter of insurance up to Mr. Reynolds—what did you mean by that—simply the matter of procuring insurance?

MR. BOTHWELL: I object to that as leading.

THE COURT: Sustained on the grounds that it is leading.

Q. What did you mean by leaving the matter of insurance to Mr. Reynolds?

A. As I had done in previous years?

Q. Yes, as to getting the insurance.

A. Surely.

Q. Did you ever authorize Mr. Reynolds or anybody else to cancel any policy for you?

A. No, sir.

Q. Explain to the court what you mean by leaving the matter of insurance to Mr. Reynolds.

A. Do you mean the time I resided in San Diego?

Q. Leaving the question of securing this policy to Mr. Reynolds—what did you mean by leaving it to him—what was the arrangement between you and Mr. Reynolds in regard to that?

A. Mr. Reynolds said that he was taking out this five-year policy, with the mortgagee clause attached, payable to me, and would take it to the bank at that time.

Q. When you answered that you had left the matter of insurance to Mr. Reynolds you had reference to securing of the insurance?

A. Yes.

Q. Was that all?

A. Yes."

RE-CROSS EXAMINATION

"MR. BOTHWELL:

Q. I understood you to say that you meant the same as it had been in other previous years. In the previous years you had taken the policy yourself and placed it in the box yourself, had you not?

A. Yes, but I said at times he would take it to

the First National Bank and I placed it in the box.

Q. That is the way you said you had done on previous years?

A. Yes.

Q. Then why in previous years, if you had placed these in the box, why didn't you look in the bank box to see in June whether or not the policy was in the box.

MR. GRAHAM: That has already been answered.

THE COURT: Yes."

Witness excused.

MR. GRAHAM: That is all on behalf of the plaintiff.

Plaintiff rests.

Whereupon, Raymond F. Graves was called as a witness on behalf of defendant and being duly sworn testified upon direct and cross-examination as follows:

My name is Raymond F. Graves. I reside at Filer, Idaho. I am in the fire insurance business. I am 28 years old. My father is F. C. Graves. I have lived in Filer since 1908. I took over the agency for the General Insurance Company of Seattle at Filer, from Arthur E. Anderson, in May, 1925. My father and I operate the business together. The license in this particular case was issued to me and later it was changed to F. C. Graves and Son. Our place of business was on Main

Street at that time, where it is now in Filer. My father was in the office with me at the time I received from Anderson at that time his expiration list, index we call it, office copies of his daily reports as to policies issued, some unused policies and some other miscellaneous supplies, such as letter heads, etc. The supplies were placed in filing cabinets in our office, those that have not been used or destroyed are still there. We received the record which has been introduced in evidence here from Mr. Anderson, along with other similar copies of daily reports, the yearly payment to secure a renewal of the policy became due September 20, 1925, and was paid to me. Defendant's Exhibit 20 is the face of the policy that was issued by Anderson to Reynolds Brothers, the face of the policy in question here. The two leaves attached to Exhibit 20 are renewal certificates that are sent to the agent by the company and delivered to the insured upon the payment of the premium at the end of the policy year. The writing in lead pencil on the face of Exhibit 20 is in my own hand writing. I had the face of the policy Exhibit 20 in my possession at one time. At that time the policy was intact, all together. I got the policy from Mr. R. A. Reynolds. On October 4th, 1926, I had talked with Mr. Reynolds prior to October 4, 1926, in Twin Falls, a few days before the policy expired, prior to September 20, 1926. The conversation occurred in Twin Falls on Shoshone Street at the Reo Sales Agency. The

girl who was working with Mr. Reynolds was present, besides Mr. Reynolds and myself. I do not recall her name. I asked Mr. Reynolds about the payment of the renewal premium on the policy. He told me at that time that because he could replace the business in the Hardware Dealer's Mutual and thereby save himself a little premium he was not going to pay the renewal premium on the policy and was going to put it in the Hardware Dealer's Mutual. I told him at that time I would leave my policy there until such time as he could get the insurance placed with the Hardware Dealer's Mutual, so that in the meantime, if the building would burn, he would not be out a policy. I did that merely as a courtesy. I secured the policy from Mr. Reynolds in his office in Twin Falls. Two weeks after our previous conversation I went back and requested him to give me the policy that he had with him and my recollection now is, that the girl working for him in the office went to the safe, opened the policy files in the steel cabinet safe and took the policy out and it was given to me there in his office in Twin Falls. I brought the policy back to Filer and wrote across the face of it what had happened to it, put it in an envelope and mailed it to the insurance company. I wrote across the face of the policy the language which appears in lead pencil and mailed it to the company. I had no further conversation with Mr. Reynolds concerning this insurance after the policy had been sent to the

company by me that I recall. The original policy which I received from Mr. Reynolds was not among the papers, records and files which were turned over to me by Mr. Anderson. I collected the premium that was due September 20, 1925, from them after it was due, I do not recall that we had any conversation at that time relative to this particular policy. I had a conversation with Mr. Reynolds the morning following the fire in the Reo Sales Agency on Shoshone Street, Twin Falls, Idaho. The reason for my being there was that the Postoffice building which adjoins the building covered by the policy in question was damaged at the same time this building was destroyed. While in Mr. Reynolds' place of business that morning I asked him if he had located the balance of his insurance on this building. I asked him if he recalled that he had told me that he was going to place it with the Hardware Dealer's Mutual. I suggested then that he look for correspondent with Mr. McKinsey, who was the San Francisco agent. I distinctly recall his stenographer looking through their correspondence in an effort to find correspondence with Mr. McKinsey relative to the insurance on this building with the Hardware Mutual. I also recall Mr. Reynolds looking through his checks in an effort to find where he had paid the premium to the Hardware Mutual on this particular building. Whereupon, defendant's Exhibit 20 was admitted in evidence over the following objection of counsel for plaintiff.

"MR. GRAHAM: I object to this for the reason that there is no sufficient foundation laid. It is only part of an instrument and for the further reason that the endorsement on the face of this exhibit is self-serving and is a self-serving declaration by the defendant."

I had a conversation with Mrs. Allen following the fire in our office at Filer. She came in the office and inquired about this insurance, criticizing me quite severely because I had not notified her that the policy had been surrendered to me by Reynolds and that I did not consider that we had had any particular reason why we should notify her under the circumstances. That it was given to us, that he said he was going to place it in the Hardware Dealer's Mutual and I had no reason to doubt that he was going to do that.

CROSS-EXAMINATION

I kept still when she said I was a poor business man. I do not know what you mean by the question, what authority you have got to cancel policies. It was given to me to send to the company. I merely made the notation as to why it was received. It didn't mean anything except to convey to them the idea that the policy was no longer in force. I had authority from Reynolds to cancel the policy. We have the authority from the company to cancel a policy at any time. I have the usual authority of

any insurance agent, that is, to issue policies, make inspections. I do not have authority to pay lawsuits. I have authority to go ahead and make temporary repairs after a fire to prevent further loss. I have exercised that authority. I didn't write a letter to the company at the time. We have thirty days within which to remit premium. I am not required to report on these premiums until thirty days after the due date. If the policy was taken out on September 20th and the premium was due September 20th, I would report the first of November. I exercise that right to hold the policy in force in case the premium is not paid. That is not a matter of authority, it is a matter of whether I want to take the chance of losing the premium as an agent. The policy lapsed in this case when it was surrendered to me. Whereupon the following questions were asked and answers given and objections interposed and rulings by the court upon the objections were made:

CROSS-EXAMINATION

"MR. GRAHAM:

Q. The policy was actually canceled on September 20th.

A. It was not actually canceled on September 20th.

Q. When was the policy canceled?

A. Either—

MR. BOTHWELL: That calls for a conclusion of law. The facts, I think, are all before the court of what occurred.

THE COURT: It is a question under the circumstances when a policy is to be canceled. I think it is competent.

Q. The premium due September 20, 1926, was it paid by Reynolds?

A. No, sir.

Q. But you carried it on until October 4, 1926?

A. Yes.

Q. Is any authority given you by the company to carry policies along for that length of time?

A. Not any.

Q. How did you come to mark the policy canceled on October 4th?

A. That is the day that I sent it to the company.

Q. When was it canceled?

A. It was canceled the day Mr. Reynolds gave the policy to me."

Reynolds could pay the premium within thirty days after September 20th, or up to and including October 20, 1926. I never at any time notified plaintiff of the cancellation of this policy or the non-payment of the premium. Their girl went to the safe and got the policy and handed it to him and he in turn handed it to me. At the time Mr. Anderson went out of business he turned over in-

surance supplies and a few abstracts, things that had accumulated around the office. He handed over the agent's record of all policies. There were something near 500 records. There were a few policies turned over to me by Anderson that had been left in his care for safe keeping. I would say about ten or fifteen. I do not recall the names of any of them. I do not think we have any record of these policies. It is absolutely impossible that this policy was one of the policies turned over to me. And if I already had the policy, how could I have gotten it from Reynolds? I was not guilty of negligence or carelessness in this matter. The premium which was due September 20, 1925, was collected 3 or 4 months after it was due. The policy was in effect during that interim. It was an act of generosity upon our part to carry it along from September 20, 1925, to March 2, 1926, without the payment of premium. Reynolds was a little short of funds at that time. We do not finance all policy holders that don't have the money. It is problematical as to how long we could carry a policy holder if he did not have the premium. I do not have any authority from the company to carry customers that way. If we want to take a chance it is up to us. We may either remit to the company ourselves or cancel the policy for non-payment. We have thirty days within which to collect and remit. If we went thirty days and the premium was not paid there would be no loss. I presume it amounts to thirty

days of grace. When a policy falls due on September 20, 1926, the policy holder has thirty days after that within which to pay the premium and the policy is still in force. I met Mr. Reynolds about September 20, 1926, in his office on Shoshone Street. He told me that he had decided to carry the policy in the Hardware Mutual. I never received any communication from the company when I sent this policy in. It is customary to send communications of that kind without a letter. I would not say that I went to Reynolds' office on September 20th, but it was close to September 20th, a few days before September 20th, either on the 20th or a couple of days before, on Shoshone Street, and on October 4th, I went back to their office on Shoshone Street and at that time had a conversation with R. A. Reynolds himself. The policy was delivered up by him to me. I do not recall that anybody was there other than the girl.

RE-DIRECT EXAMINATION

I talked with Reynolds in September and October, 1926, on Shoshone Street South, where they had the Reo Sales Agency. They were in that building, at least I do not know the name of the building, it is next to the harness shop on Shoshone Street South in the same block as the White Undertaking Parlors.

L. E. BECKER was called as a witness on behalf of defendant and being duly sworn testified on direct and cross-examination as follows:

DIRECT EXAMINATION

I have previously testified in this case. I am assistant secretary of the defendant company and have control of the records of fire insurance policies canceled and returned to our office. It is the customary practice for the agents to return only the face of the policy. It cuts down the price of postage and the face is all that is necessary and that is the custom of insurance companies throughout the United States. Exhibit 20 is the original record in my office. Exhibit 21 is the office record card of the policy that was issued. It contains an office record we have and shows every transaction on that policy. That is an original record of our office. The meaning of No. 13 on the card is that we lost the business by the business being placed in another company. Exhibit 21 was offered in evidence and received by the court over objection of plaintiff's counsel on the ground that there had been no sufficient foundation laid and that it was not binding upon the plaintiff in this action and does not tend to prove any issue in the action. Said Exhibit 21 is attached to this Bill of Exceptions and by reference made a part thereof as Exhibit 21. The two leaves attached to Exhibit 20 are renewal

certificates. Those two sheets which are attached to the face of the policy are office records. They are first sent to the Idaho Rating Bureau, who approve them and attach to the policy.

CROSS-EXAMINATION

When the policy in question was returned to us by our agent at Filer it was attached to our records and all records were canceled in the office, taking the policy off our books, both as to reservations, liabilities and every phase of it. It was ended. We handle a thousand policies a year and 100,000 policies are on our books. The man who receives the policy gets the record card and makes an office record. Every policy goes through the same routine. The man who gets the face of the policy marks this card as cancelled. This policy is sent in and turned over to the cancellation clerk to make this record and then goes through the finance record of the insurance department. No formal action is taken by the board of directors in cancelling the policy. An agent has authority to cancel it. All soliciting agents have that power. He has power to cancel the policy for any reason he may see fit. There was no letter written with this. If we want to know any detail we ask the agent; the collection of the premium and all that is up to the agents to make. No agent is allowed to make adjustment of loss unless he refers it to us for specific instruc-

tions. He has no authority to waive any conditions of the policy. He has authority to cancel the policy. If a premium is not paid it is up to him. Our collection rule is thirty days and we give a lee-way of fifteen days. We allow him thirty days flat cancellation and then a lee-way of fifteen days sometimes. Forty-five days is the maximum. It is the duty of the agent in case he has notice of any breach of the policy by the policy holder to cancel the policy without taking it up with us. It is up to the agent to look after the company's business and that is what he is here for. The renewal certificates are made out each year after the policy premium is paid and renewed. This renewal certificate dated September 20, 1927, was attached to the policy in the office; as each of the policy premiums come due this was sent to the rating bureau for approval for each year and sent back to the Seattle office and attached to the policy. The renewal certificate which renewed for one year to 1927 is a part of our office record of the policy in the policy itself. The payment of the premium renews the policy. This is a part of our office records. At the time the policy was sent to us we made no demand on the plaintiff in this action for the payment of premium, because he had canceled the policy. No, we made no demand on the plaintiff for the payment of the premium. No demand or notice was given her of the cancellation of the policy and no notice given to any person on her behalf. Our com-

pany never made any demand upon her for the payment of the premium. The agent gives notice of that kind, but we see that the agent fulfills his duty and all parties are notified unless the policy is surrendered, which in itself is evidence. We gave no instructions to our agent at Filer to make a demand for this payment. There was no request from us. When the agent surrenders the policy we go by what he tells us that it has been cancelled. It is up to him to get his commission. We take information furnished by the agents absolutely.

RAYMOND GRAVES re-called as a witness on behalf of defendant testified as follows:

DIRECT EXAMINATION

I never gave notice of any kind or made demand upon the plaintiff for the payment of the premiums which were due September 20, 1926, or 1927. I gave no notice to her on behalf of the company of the cancellation of the policy. I do not know the girl's name that was in the office at the time I got the policy. She lives in Twin Falls. I do not know whether it is the same girl that is working there now or not. I don't know J. E. White's daughter by name. I didn't ask Reynolds for the premium on October 4th. It had been previously undestood that he was going to surrender the policy to me. I went over for the policy.

RE-CROSS EXAMINATION

I am sure the policy was on the building and not on the hardware stock. We carried a policy on the hardware stock but it was not cancelled at that time. Anderson lives somewhere in California.

Whereupon, RONALD L. GRAVES was called as a witness on behalf of defendant, and being duly sworn testified upon direct and cross-examination as follows:

DIRECT EXAMINATION

My name is Ronald L. Graves. I live at Filer, Idaho. I am in the garage business. Have lived at Filer twenty years. I am a brother of Raymond Graves, who is in the insurance business. I lived directly across the street and a little north of the building at the time of the fire on August 29, 1928. I came to Twin Falls the morning after the fire with my brother, Raymond Graves. I saw R. A. Reynolds at his office in the Reo Sales Company on Shoshone Street. Mr. Reynolds and his stenographer and Mr. Taber of Twin Falls, were present. I didn't have any conversation with Mr. Reynolds. I heard a conversation between Reynolds and my brother. Before I went there Mr. Reynolds and the bookkeeper were hunting for something, looking through check stubs and correspondence, trying to find something which had been written to Mr.

McKinsey, the agent of the Hardware Mutual, and Mr. Reynolds asked the girl to find a letter, if she could, a letter to Mr. McKinsey or check stubs, and we went into the place and something was said about furnishing Filer with good entertainment and Reynolds said, "I cannot find the insurance on the building." I remained there fifteen or twenty minutes. My brother went down there to find out about getting temporary repairs on the Postoffice building adjacent to the Roof Garden. Reynolds owned the Postoffice building. My brother had insurance on that building.

CROSS-EXAMINATION

I didn't go down to Twin Falls for this express purpose. I did not go along as a witness. My brother wanted me to ride with him and I had nothing else to do, that is all of the conversation I heard that morning. I heard something else in regard to insurance, but not on that day and it was not in Mr. Reynolds' place of business. I never went to Mr. Reynolds' place of business with my brother or father in regard to insurance at any other time. I paid particular attention to the conversation. I was not particularly interested in the conversation. On the way down my brother said he was going down to see Reynolds about making temporary repairs on the Postoffice building. The question at that time was the policy on the Post-

office building. The policy in question in this action was not discussed on the road down to Twin Falls. I didn't make a memorandum of the conversation. Taber, Reynolds, the bookkeeper, my brother and myself were present. Mr. Reynolds was looking for stub checks to Mr. McKinsey and the Hardware Mutual. Mr. McKinsey was the agent for the Hardware Mutual. I am not acquainted with all these insurance agencies. I heard that he was agent for the Hardware Mutual. I know the agents of several insurance companies. I do not know the agent for the New Zealand. My brother is agent for the General Insurance Company. I do not know the the general agent of any other company. Something was said about a policy on the stock in the Hardware Mutual. That was not the one that he was interested in trying to find. He knew that that one was—I didn't see him bring that one out. He said he knew he had a policy on the stock in the Hardware Mutual. I don't know whether one or a dozen. I don't remember exactly what he said. I believe he said he had a policy on the stock. He was not interested in the policy on the stock. I just happened to overhear this conversation. I didn't spend any particular time to charge my memory with the facts. I heard the conversation and remember what I heard. That is all that occurred to make me charge my memory with these facts. There was no criticism of my father or brother in regard to the manner or method in which

the insurance had been handled. There was no criticism that might involve them or make them liable in some way. I never heard any criticism; that is all the conversation I remember. The question arose in that conversation in regard to insurance in the Hardware Mutual. Both names were mentioned, the Hardware Mutual and Mr. McKinsey. Reynolds instructed the bookkeeper to see if she could find any correspondence or any check stubs concerning checks which might have a bearing upon where he had paid the premium to the Hardware Mutual or McKensey on an insurance policy on this building. He referred to this building, the building that was burned. He said he had a policy in the Hardware Mutual on that building. He had had one on the building that was burned and was trying to find out where he had paid the premium on that policy. I know it was on the building. He didn't say as to the amount of the insurance. He didn't say when it was taken out, if he did I don't remember. I don't think I could be mistaken about the policy in the Hardware Mutual being on the building and not on the stock. Whereupon the following question was asked and answer given:

"Q. If he didn't have one with the Hardware Mutual on the building, then you must have been mistaken.

A. I must have. He had one with the Hardware Mutual and was looking for the place where he had paid the premium on the building. He must

if he didn't lose any hardware stock in that fire."

In response to a question by the court, the witness testified:

"I do not write insurance." And continued further, "I have never been an agent for the General Insurance Company of America."

Whereupon, F. C. GRAVES was called as a witness on behalf of the defendant and being sworn testified upon direct and cross-examination as follows:

DIRECT EXAMINATION

My name is F. C. Graves. I live at Filer, Idaho. Have lived there for twenty years. Have been engaged in the real estate and insurance business at that point for nineteen years. At present I am State Senator from Twin Falls County. I have been a member of the Public Utilities Commission of this state. I am acquainted with Arthur Anderson, who formerly lived at Filer. My son Raymond, who was associated with me and myself took over the business of Mr. Anderson in May, 1925. Our place of business is located about the center of the block on Main street, four or five doors west of the First National Bank of Filer. We have a steel safe or filing cabinet in our office for the office files and records and papers. We took over the insurance business from Mr. Anderson. We took over his

daily reports, copies. We may have taken over three or four policies. I do not now recall. I didn't see the policy in question in this action. The one that was written by Mr. Anderson for Mr. Reynolds in which Mrs. Allen is named as mortgagee, until Raymond went to Twin Falls and brought it up to return to the company. That was the first time that I saw the policy. I have general supervision of the business and have access to all the papers, records and files. After I saw the policy in the possession of my son it was placed in an envelope and mailed to the General Insurance Company of America. It was mailed by Raymond Graves. I have known Mr. Reynolds for a number of years. He was in our office during the next forenoon after the fire. My son Raymond and I were present. He made the statement that he wished he had paid the premium on that policy. I don't recall what was said in reply to that. Defendant's Exhibit 22 is a letter, is a copy of letter taken from our files on yesterday, copy written in September, 1926, to Mr. Reynolds, signed by Raymond Graves. The slip attached to the letter is a renewal slip that was supposed to be attached to the policy by Mr. Reynolds. This was taken from our files on yesterday. The signature of Raymond F. Graves appears upon the bottom of the letter. That is the signature of my son. I am reasonably familiar with the handwriting of R. A. Reynolds. The handwriting in the left hand corner written in ink is, in my opinion, the

handwriting of R. A. Reynolds. Defendant's Exhibit 22 was admitted in evidence over plaintiff's objection that no sufficient foundation had been laid; that it was immaterial, irrelevant and not in issue and not binding upon the plaintiff in this action, as no notice of demand was made upon the plaintiff. The exhibit is annexed to this Bill of Exceptions and made a part hereof and appears as Exhibit 22 herein.

CROSS-EXAMINATION

All I know about this letter is that it appears to have been written by Raymond. I recall that the policy was put in an envelope and mailed. I don't recall the time of day. It was the 4th day of October. I don't know the day of the week. I think no letter was written at the time. Just merely a notation made across the face of the policy. I saw it after the notation was made. I didn't tell you after this occurred that it was written across the face of the policy canceled in red ink. I didn't say red ink. I don't know how it was written—black ink—I don't recall the color. There was written across the face "lost to the Hardware Dealer's Mutual, October 4, 1928." I don't know that I saw him write it. I saw it after it was written. I am not sure as to whether it was in red ink. I think it was in black ink. That is my recollection. I have no particular recollection of putting any other

writinng on any other instrument of that kind that same day. I remember this particular instrument because I hated to lose the business. That was not the first policy I had lost that year. I don't recall when some other policy was lost. Reynolds had a large line of insurance and I was interested in holding it if I could. The size of the business impressed me at the time the policy was returned. I don't recall anything else that occurred in regard to this policy that fastened it upon my memory. I saw the policy after it was endorsed. It was put into an envelope and mailed to the General Insurance Company of America at Seattle. It was thrown in the file where we throw our letters for the mail. I am sure that it was not in red ink. I am not sure that it was in black ink. I think it was in ink. Whereupon the following question was asked and answer given:

"Q. Examine the endorsement on that and tell me how it is written. (Exhibit handed to witness.)

A. In pencil.

Q. Is it not in ink?

A. No, sir."

I think I am not mistaken as to what generally transpired on that particular day. I saw Reynolds in my office in the forenoon after the fire. No notice was given of the purported cancellation or termination of the policy to Mrs. Allen. I made no attempt to make a demand upon her for the payment of the premium. I think no attempt was

made to collect the premium from Mrs. Allen or any demand made for her through our office. I know I didn't make any attempt. Whereupon the following questions were asked and answer given:

"THE COURT: When you took over the insurance business from Mr. Anderson, did he deliver to you this policy?

A. I think not.

Q. When did you first notice the policy was there?

A. The first time I saw the policy was after Raymond returned from Twin Falls and returned with the policy and prepared to send it to the company about the 4th of October.

Q. That was in 1926?

A. Yes.

MR. BOTHWELL: What policies were turned over to you by Mr. Anderson.

A. I don't recall.

MR. GRAHAM: How many?

A. Possibly six or eight. I would not say exactly."

I don't recall any of them. He turned over the policies that had not been delivered; they were turned over to us to be delivered. When requested we keep policies for safe keeping for our policy holders. We have a large safe and sometimes we hold a policy. We keep an index file of policies left with us. This policy was not left with us. Because this being a large line of business we were

particularly anxious to take good care of it. I don't know that I have any distinct recollection outside of that fact. I have no particular recollection as to any other policy. I think that I would remember as to this policy because it was Reynolds Brothers and as I would any other merchant that had a large line we were anxious to hold this line of business. The premiums on Reynolds Brothers insurance amounted to $300 or $400 a year at that time. Several policies were turned over to us by Anderson, but not by any of the Reynolds boys. I am sure of that. I didn't examine the policies personally at that time or make a record of them. My son took the policies over. I saw the policies and there were probably six or eight or ten. I cannot tell the names of any of them. I know Reynolds Brothers' policy was not in them.

Whereupon RAYMOND GRAVES was recalled as a witness on behalf of the defendant and testified upon direct and cross-examination as follows:

DIRECT EXAMINATION

My attention has been called to defendant's Exhibit 22, which consists of two pieces of paper. My signature appears to this letter. I am fairly well acquainted with the handwriting of R. A. Reynolds. The writing on the left hand corner of that letter is in the hand of R. A. Reynolds. The slip is called

a renewal certificate. The renewal certificate is a certificate issued by the General Insurance Company previous to the time these policies come up each year for renewal and submitted to the Idaho Rating Bureau for their approval as to the rates that apply to that particular policy, as it is removed. Two copies of it are sent to us and one copy is retained by the home office at Seattle. We retain one for four files and as a rule send the other to the person who holds the policy. I recall writing the letter, Exhibit 22. I mailed it along with our usual mail to Reynolds Brothers at Twin Falls. The letter was returned to me afterwards with the notation in ink down in the left hand corner. That occurred about the date that appears on the letter. I was present in the office the morning after the fire when Mr. Reynolds came in. My father was there and Mr. Reynolds. Mr. Reynolds made the statement that he wished we had made him pay the premium on that policy. The policy had been sent in to the company approximately two years before that. I made the trip to Twin Falls for the express purpose of getting the policy and sent it to the company. I got it from Reynolds. His stenographer was present. My brother didn't go with me at that time. He went with me the morning after the fire. The time that I recovered the policy was two years before the fire.

CROSS-EXAMINATION

I wrote this letter after I had had the conversation with Reynolds, a few days before September 20, 1926, when he told me about the cancellation of the policy, we used every effort that we could to hold the business. This letter does not indicate that I had any conversation in regard to cancellation of the policy with Reynolds. I stated yesterday that it was agreed that the policy would be cancelled. I wrote the letter in an effort to do all that I could to hold the business. Occasionally a person will change his mind. I had a conversation with him on April 18th or 20th about the payment of the premium. I had not changed my mind as to the cancellation. I was going to give him every opportunity to change. It was agreed between Reynolds and myself on the 20th of September, 1926, or two days before that, that the policy would be cancelled. I wrote the letter because I wanted to give him an opportunity to change his mind. The policy was cancelled on October 4th. The date that I went to get the policy was not agreed upon. I merely happened to go back on October 4th to get the policy. It happened to be that day that I went with the intention of getting the policy. That was my purpose. It happened to have been on October 4th. It could have been October 5th or October 3rd. I recall no attempt to collect the premium after September 20th. I recall no other visits made by me between September 20, 1926, and October 4, 1926.

Whereupon, L. F. BECKER was recalled as a witness on behalf of the defendant and upon direct and cross-examination testified as follows:

"MR. BOTHWELL: Before asking Mr. Becker, in order to be certain as to the record, I understand we are not required to prove the agency by the certificate issued by the state, I understand that has has been waived.

THE COURT: Yes."

Mr. Graves' testimony as to the renewal certificates. That is the way in which it is handles.

"MR. BOTHWELL: We offer in evidence Chapter 48, Senate Bill No. 128, Laws of 1923, approved February 23rd, 1923, and particularly call attention to Section 6 thereof. We ask that the entire Act may be admitted in order to prove the relation of one section to the other.

THE COURT: It may be admitted."

Whereupon the same was admitted as Exhibit 23, and is annexed hereto and made a part of this Bill of Exceptions and appears as Exhibit 23 herein.

Whereupon the defense rests.

Whereupon, R. A. REYNOLDS was recalled as a witness on behalf of plaintiff on rebuttal and testified on direct and cross-examination as follows:

DIRECT EXAMINATION

My explanation as to this exhibit 22 is that that letter came into the office at a time when I was very

busy and I evidently did not look over the contents carefully. Undoubtedly I thought this referred to a merchandise policy which we were carrying with the old line company. I think the New Zealand. I think Graves was agent at that time—perhaps some other company—which we intended cancelling and placing with the Hardware Mutual. I had talked over with the assignee of the Filer Hardware Company some policies I had on merchandise stock in the New Zealand Company. I talked over with them the idea of changing it from the old line company—merchandise stock policy—to the Hardware Mutual and save 50% premium and they all were agreeable that we do that. The assignees were Mr. Shearer and Mr. Nichols. I afterwards took out insurance in the Hardware Mutual on the stock. I didn't at any time take out insurance on the building in the Hardware Mutual. I heard the testimony of Raymond Graves in regard to coming to our office about September 20th, 1926, or about two days before that, and he stated that that conversation was had in our place of business on Shoshone Street in Twin Falls. Our place of business in September 1926 was on Second Avenue South not Shoshone Street. We did not move to Shoshone Street until about the middle of January 1928. We moved at that time because we sold our merchandise stock, the hardware and implement stock, to the Mountain States Implement Company; they retained the building that we were in and we moved in January and

February, 1928. We were in the automobile business. We were not in that building in 1926 or 1927. We had a girl a portion of the time doing stenographic work and a bookkeeper in October 1926, when Raymond Graves spoke about a visit to our office on Shoshone Street in October 1926. The bookkeeper was Harvey Coggins. He had access to the records of the office and papers in the safe. The girl we had was doing stenographic work. She did not have access to the papers or have anything to do with the filing of papers. She simply attended to stenographic work. We had a girl just a portion of the time at that time, perhaps three or four hours a day. I would not be sure whether she was there at that time or not. Her line of duties were such that she would not have access to the safe and papers. Whereupon the following question was asked and answer given:

"Q. Speaking about the policy, did you have the policy at any time in your safe in your place of business?

A. No sir, not to my knowledge. I never had any safe in my place of business."

Yes, I remember we had two policies with the New Zealand and two or three more other companies. I cannot remember. The change was made on the policies on the stock to the Hardware Mutual. I heard the testimony of Ronald Graves in regard to a certain conversation that was had in my office on the day after the fire. I don't remember

any such conversation. I remember that Paul Taber was there in the office. Don't remember whether Ronald was there or not. I had some business with Taber. I don't know whether it was the next day after the fire Paul was in our office. Sometime after the fire.

"THE COURT: Do you recall stating that you wished they had made you pay this premium.

A. I don't.

MR. GRAHAM:

Q. You also heard the testimony of F. C. Graves as to a conversation in Filer the morning after the fire?

A. Yes, I was supposed to be in his office according to his statement. I don't think I was in Filer the next day. I was up all that night and I didn't get up until afternoon the next day. I slept all morning. I don't believe that I was in Filer that day at all."

I think I was in Graves' office after the fire. I heard his statement that the morning after the fire in his office that I made the statement that I was sorry that he hadn't made me pay the premium on the policy. I have no recollection of any such statement.

CROSS-EXAMINATION

MR. BOTHWELL: Did you have any hardware in this building when it burned?

A. Yes, we had some hardware but not a great deal.

Q. What hardware did you have?

MR. GRAHAM: I object to that as not proper cross examination upon rebuttal.

THE COURT: Sustained."

We had changed our insurance from the New Zealand. That was the only one that I can remember, to the Hardware Mutual, but I think there were two or three others. The Hardware Mutual did not have a local agent. I don't remember the man's name that was representing them. I think he lives here in Boise. As to the notation on the left hand corner of Exhibit 22 I am sure I don't remember having written that on that, but that is my writing. I cannot remember that I did write that on that corner. I don't remember having received the letter. As a matter of fact I didn't want to cancel this policy. I didn't want Graves to cancel it. The Roof Garden policy. No sir, I should say not. Whereupon the following questions were asked and answers given:

"Q. So that when you wrote that notation on the corner of this letter here, you say the only explanation you have is that you were busy and you think you did not read the letter.

A. I would doubt it very much, because my stating on there that it had been placed with the Hardware Mutual, I would naturally think that this referred to merchandise stock. I didn't take any pol-

icy on this building with the Hardware Mutual at that time. I doubt whether I would have put the statement on there if I had read the letter very carefully.

Q. It says here very plainly, Policy covering garage and dance hall building here—that is, in Filer—you had no other building or no other dance hall or no other garage building there?

A. No.

Q. The only one you had there, and that was the amount of the policy premium—$130.

A. A $10,000., policy.

Q. Do you remember that this renewal certificate was along with that letter.

A. I do not remember.

Q. Do you remember that you took out this policy with the General Insurance Company of America.

A. I remember I took out a $10,000., policy with the General Insurance Company of America.

Q. And if you did not want the policy canceled why didn't you pay the premium due on the 20th day of September, 1926.

A. I don't know unless it was not brought to my attention forcibly enough.

Q. Forcibly enough—why didn't you pay the premium due on September, 1927.

A. I do not know that I was ever billed for it—perhaps I wasn't.

Q. Perhaps you weren't bill for it?

A. No, sir.

Q. Didn't it occur to you when you didn't receive a bill in September, 1927 that there might be some reason that this policy was canceled?

A. No, I didn't pay a great deal of attention to the insurance policies—not much as I should have."

I placed my insurance ordinarily with Anderson, and when a premium would come due he would take care of it and come and collect. I think I would remember if I had surrendered a policy to Graves at Twin Falls on October 4, 1926. I would remember that particular policy, because that policy I took out was a five year policy. The reason I took that was that Arthur Anderson came to me and explained to me the advantages that I would have with a five year policy. That had a mortgage clause on it and is the only policy I took with the mortgage clause. They explained to me that advantage and that it would be, and that there would be a little saving on the premium over the old line company and I was converted to this particular policy. After I got the policy I was satisfied that that was off my mind for five years. I know the premiums were to be paid annually on the policy, I knew that. I think Mrs. Allen and I discussed that the premiums were to be paid annually on the policy; before the policy was taken out I told her that Anderson had talked to me about such a policy and I asked her permission—if it would be alright with her if I took out such a policy and she said it would. I inquired from

Anderson about three months ago in California as to where the policy was. I paid Anderson the first premium. I don't know whether it was cash. He always owed me, and we traded our accounts on premiums three or four months afterwards, just as Graves did. He would come around to collect his premium, and I would give him a check for his account at that time. We traded accounts. I did not inquire at the bank as to whether this policy had been deposited in the bank. I did not make any inquiry about that. I don't think I ever had any correspondence with Mrs. Allen in regard to the policy. I don't think that I wrote to her about it. I recall that Mrs. Allen was back to Twin Falls and Filer in June 1927. I recall paying interest on these notes in October 1927. She was there the same year. At the time she was there in June I think I remember her asking me if the insurance was alright or something. I don't remember. It was not discussed to any detail at all. I don't remember what I said to her at that time. Whereupon the following questions were asked and answers given.

"Q. Did you tell her it was there in the bank—policy in the bank—

MR. GRAHAM: I object to that as not proper cross-examination.

THE COURT: Overruled.

A. I don't think she asked me; if she didn't, I didn't tell her.

Q. What was she asking you about this?

A. I don't remember. I am not sure that the insurance was mentioned."

I didn't tell her at that time that I had a policy in the Hardware Mutual. I didn't tell her at that time that I had surrendered this policy, or that it had been canceled. When I was in Mr. Graves' office I don't remember making the statement that I wished that they had made me pay the premium. I don't recall any such statement. The building we were occupying in 1926 is a block east of where we are now, one-half block east on a different street entirely, around the corner and down the street. Mr. Coggins was our bookkeeper in 1926. The stenographer was not authorized to take anything out of the safe. I would say that I did not ever direct her to take anything out of the safe. I didn't ask her to take papers from the safe. I imagine we had insurance policies in safe in 1926 and 1927. I had had insurance policies in our safe for twenty years. We were cancelling policies and putting them in the Hardware Mutual at that time. We may have given Mr. La Hue a policy. I am not sure as to that.

GUY H. SHEARER was recalled as a witness on behalf of defendant and testified in rebuttal upon direct and cross-examination as follows:

DIRECT EXAMINATION

I am one of the assignees of the Filer Hardware Company. Mr. Nichols of the Salt Lake Hardware

Company is the other. Reynolds was agent for the assignees. I recall in 1926 that the question of renewing the policies on the Hardware stock in the New Zealand and some other companies came up and thought that the policies were taken out in the Hardware Mutual. He came to me and stated that he could get insurance in the Hardware Mutual at a greater saving as I recall, I stated that the New Zealand policies, two of them I believe at that time were $10,000., each, would expire soon. He wanted my permission to re-write the insurance in the Hardware Mutual, and I gave it to him. The Filer Hardware Company's place of Business in 1926 was on Second Avenue South. They never had their hardware business on Shoshone Street; they continued their hardware business on second avenue south until the assignees sold the entire stock and that, I think, was the first of 1928. He could not have possibly been on Shoshone Street in 1926 and 1927.

CROSS-EXAMINATION

In 1926 that store on Second Avenue South was just around the corner and half a block down, opposite the Munyon Auction ground. Mr. Reynolds said he was paying too much premium and wanted to change the policies from the New Zealand to the Hardware Mutual.

MR. GRAHAM: That is all of our evidence, Your Honor.

MR. BOTHWELL: That is all.

THE COURT: I think I will hear you at 1:30 on this. The question I desire counsel to discuss is the analysis of the testimony and also present whatever authorities you wish on the application of the legal principles involved, while we have it fresh in our minds. The impression I have at this time, I see no difficulty in applying the legal principles involved here. Of course counsel may be able to call my attention to some that I haven't in mind. The question I see involved here is the question of the analysis of the testimony, together with the contract of insurance and its provisions which include the mortgagee clause attached to the contract which becomes part of the contract. I will hear you at 1:30."

Whereupon oral argument was had at 1:30 and time given for filing briefs. Briefs were thereafter filed and on July 1st, 1929, the following opinion in writing was delivered by the court:

Whereupon the following memorandum opinion in writing was filed by the Court on July 1st, 1929:

(Title of Court and Cause)

No. 1393

MEMORANDUM OPINION

July 1929

W. D. GILLIS and John W. Graham, Attorneys for Plaintiff.

Bothwell & Chapman, Attorneys for Defendant.

CAVANAH, DISTRICT JUDGE:

The question arising upon the record is whether the plaintiff, as mortgagee, is entitled to recover upon a policy of fire insurance issued by the defendant on September 20, 1924, in the amount of $10,000, covering a two-story brick building, situated at Filer, Idaho, after the same had been destroyed by fire. The owner of the premises, previous to the execution of the policy, made a mortgage to plaintiff securing the balance remaining unpaid of $12,647.00, and delivered the policy to plaintic as further security for the debt secured by the mortgage. The defendant and the insured attached to the policy the standard form known as "mortgage clause with full contribution" executed by defendant, which provides that loss or damage under the policy shall be payable to the plaintiff, the mortgagee. On August 29, 1928, the building covered by the policy was totally destroyed by fire. At the time of the fire there was a balance of $10,313.80 due on the mortgage, and in due time plaintiff made proof of loss in the sum of $10,000. The defendant denied liability, and this action was brought to recover the full amount of the policy.

There seems to be no question under the evidence but that the amount of damages sustained by the fire exceeded the full face of the policy.

The defendant defends upon the ground that the policy became null and void as of 12:00 o'clock noon of September 20, 1926, and from that time ceased

to be in force for the reason that the mortgagors, Reynolds, acting for themselves and for plaintiff, failed to pay the then current annual premium to defendant as provided in the policy, and that about October 4, 1926, the Reynolds informed the agent of the defendant that they had replaced the insurance by a policy procured from another company, and at the time while acting for themselves and for plaintiff, delivered and surrendered the policy to the defendant to be cancelled, which was done.

The provision of the mortgage clause which is pertinent here as providing for loss or damage to be paid to the plaintiff, provides that the interest of the mortgagee in the insurance shall not be invalidated by any act or negligence of the mortgagor, or owner of the premises, and in case of such neglect of the owner or mortgagor to pay any premium due under the policy, the mortgagee, shall, on demand, pay the same, and that the defendant company reserves the right to cancel the policy at any time for the benefit of the mortgagee for ten days after notice to the mortgagee of such cancellation.

The controlling questions would seem to be, was R. A. Reynolds, one of the mortgagors, after the clause was attached to the policy, authorized to cancel the policy on October 4, 1926, and if not was it a five-year policy, or a policy for one year to be renewed only upon payment of premium in the manner provided in the mortgage clause?

A review of the testimony discloses that in April,

1924, the time when plaintiff left Filer, Idaho, for California, where she remained until after the property was destroyed by fire, the premises were insured, and before leaving Reynolds agreed with her to carry the insurance on the building at all times for the amount of $10,000. The policy then in force expired April 20, 1924, and Reynolds at that time took out the policy in question, and paid the annual premium until September 20, 1926, and the defendant company attached thereto the mortgage clause. No demand was ever made on plaintiff to pay the premium becoming due on Sept. 20, 1926, or any premium thereafter, or notice given to her that the premiums had not been paid or that the policy had been cancelled by the defendant. At the time the policy was written and the mortgage clause attached, Reynolds requested the agent of the defendant to place it in the safety deposit box of plaintiff at the First National Bank of Filer, which Reynolds says the agent then agreed to do. The policy was not taken to the bank, but was thereafter found in the possession of the agent of the defendant, marked "cancelled". There is some testimony that the policy was secured from Reynolds, and in response to a letter of Sept. 21, 1926, of the agent of the defendant, enclosing a renewal certificate of the policy and requesting payment of the premium then due, he stated that the policy had been placed "by Hardware Mutual" and to cancel it, and that there was found in the office of the agent of the defendant a

record reciting that the policy was cancelled October 4, 1926, but says that when he wrote the response he had in mind another policy. It is clear that the relation existing between plaintiff and Reynolds was that of mortgagor and mortgagee, with the understanding that Reynolds would carry the insurance on the building at all times, and the defendant had knowledge of that fact, as Reynolds paid the first two years' annual premiums and requested the mortgage clause to be attached to the policy, which informed the defendant that she held a mortgage on the premises, and in case of cancellation of the policy by reason of non-payment of premium, or otherwise, by the mortgagor, she should be notified and given time to protect her security with insurance as provided in the mortgage clause.

The first conclusion that arises from the dealings between the plaintiff and Reynolds is that he, as mortgagor, arranged with the defendant for the insuring of the premises, with no authority given to him to cancel the policy. The character of the agency, if any existed, is a disputed issue of fact, and presents the question as to whether the scope of authority conferred upon Reynolds was large enough to embrace all purposes connected with the placing of the amount of insurance. As has been said, we have here a situation where Reynolds, the mortgagor, had secured the insurance from the defendant with the mortgage clause attached to the policy for the protection of plaintiff's mortgage, and

when that was done the defendant company agreed, by attaching the mortgage clause, to deal with her as mortgagee in the manner provided in the mortgage clause before the policy could be cancelled or forfeited. The evidence indicates the absence of any desire upon the plaintiff's part to empower Reynolds by his voluntary act to create a situation giving him authority to cancel the insurance, but merely requested that the property already insured be kept insured. The mere fact that Reynolds may have had possession of the policy and requested its cancellation would not be sufficient to constitute authority from the plaintiff to cancel the policy, in the face of the provision in the mortgage clause requiring the company to give the mortgagee notice of such cancellation, which was intended to guard against such act of the mortgagor and for the protection of the mortgagee so that she could keep the property insured for the protection of her loan; otherwise the provision in the mortgage clause requiring the insurer to deal with the mortgagee would be of no avail. The neglect and acts of the mortgagor and the insurer left the plaintiff without knowledge of the cancellation of the policy and unprotected, which the defendant had expressly agreed not to do by the provision in the mortgage clause. The mortgage clause became a separate contract between the plaintiff and the defendant, and she having a large loan on the property was entitled to have the insurer comply with its terms. So I am

unable to find from the evidence sufficient testimony to convince me that the plaintiff authorized Reynolds, the mortgagor, to act for her in cancelling the policy, even if he did so, or that the acts of Reynolds were sufficient to bind her in that regard. The mere fact that the mortgagor agrees to insure the mortgaged premises, and thereafter directs the insurer to cancel the policy, in face of the provision contained in the mortgage clause requiring the insurer to notify the mortgagee of any cancellation or default in payment of premium, does not grant him authority to cancel it, unless that authority is plainly and unequivocally conferred or is waived by the mortgagee. The authority of the agent is determined by the terms of the request made by the principal. A case analagous to the present one is City of New York Inc. Co. v. Jordon, et al., 284 F. 429, where the court said (syllabus): "An agent to procure insurance is not authorized to cancel it unless that authority is plainly conferred, and it is not plainly conferred by a request by the owner of property already insured that it be kept insured and to keep him insured at any time any company cancelled a policy." It is now settled that "an agent to procure insurance is not from that engagement alone authorized to effect a cancellation of the policy,"—Michelsen v. Franklin Fire Insurance Co., 36 Ida. 638; Lauman v. Concordia Fire Insurance Co., 195 Pac. 951. Nor is the mortgagor who was to carry insurance at his expense under an agreement be-

tween him and the mortgagee authorized to cancel it or the insurer to declare it cancelled without giving the mortgagee notice and demanding payment of the premium as provided in the mortgage clause, for if such were not the case the mortgage clause would be of no protection to the mortgagee against the negligent acts of the mortgagor. The phrase "to carry insurance at all times on the premises by the mortgagor" means nothing more than to secure insurance, and does not carry with it the general authority sometimes granted to an agent or broker to do everything necessary to effect the insurance and terminate it.

The objection that the plaintiff should not recover because the policy is one for one year with the privilege of continuing the insurance from year to year during the term of five years may be disposed of briefly. It is urged that by that provision of the policy the company agreed to insure the applicant for a term of five years from year to year, and in such case the option is left with the insured as to whether he wishes to continue or renew the policy or withdraw. The essential provision of the policy necessary to a consideration of this question reads as follows:

> "Amount $10,000.00 Rate $1.68 Premium $130.00
>
> IN CONSIDERATION of the stipulations herein named and of One Hundred Thirty and

40/100 Dollars First Annual Premium, and by the payment of the then current annual premium to this Company, at or before 12 o'clock noon, on or before the 20th day of September in every year, renewing from year to year within said term, does insure C. L. and R. A. Reynolds for the term of five years from the 20th day of September, 1924, at noon, to the 20th day of September, 1929, at noon, against all direct loss or damage by fire except as hereunder provided - - -"

It seems clear by the above provision that the policy was a five year term policy for $10,000, payable upon loss or damage by fire. The premium was payable annually in advance. The first premium of $130.00 was paid for the year commencing Sept. 20, 1924, and for subsequent years to Sept. 20, 1926. The expression in the policy "does insure C. L. and R. A. Reynolds for the term of five years from the 20th day of September, 1924, at noon, to the 20th day of September, 1929, at noon" makes it clear that the policy is one for a term of five years and continues in force during that period, provided the annual premiums are paid in advance at or before twelve o'clock noon of September 20th in each year. If the insured chooses to pay the premium each year in advance, the company was obligated to carry the insurance for a term of five years, and it was only subject to termination if the annual premium was

not so paid. Miller v. West. Union Life Inst. Co., (Wash.) 180 Pac. 488.

This construction was no doubt the intention of the parties, as we find indorsed by the company on that part of the original policy produced, "Expires Sep. 20, 1929," and at the top of the second page of the agent's record, Exhibit "3", in a summary of the contents of the policy, the language "Term five years." Effective Sept. 20, 1924." The provisions of this policy are similar to the provisions found in life insurance policies, and it is generally held as to these policies that where a term is expressed for life or a definite number of years the policy is a continuing contract for the term therein expressed, subject only to forfeiture for non-payment of premium. In the case of McMasters v. New York Life Ins. Co., 78 F. 33, the court said: "A life policy, delivered upon payment of the first year's premium, is a continuing contract for the life of the insured, subject to be forfeited for non-payment of premiums, and not merely a contract for a year, renewable by payment of subsequent premiums."

There does not seem to be any ambiguity in the language contained in this policy, as it seems clearly to convey the idea that the parties intended the policy to be for a term of five years and to remain in force during that period as long as the annual premiums are paid in advance as provided therein.

A liberal construction should be placed on contracts of insurance to uphold them, as they are pre-

pared by the insurer and the conditions contained in them which create forfeitures will be construed most strongly against the insurer. Haas v. Mutual Life Ins. Co., 121 N. W. 996. The payment of the annual premium is only a condition subsequent to the continuation of the policy, and the non-performance of which may incur a forfeiture of the policy or may not, according to the circumstances, and it is always open for the insured to show a course of conduct on the part of the insurer which gave the insured reasonable ground to infer that a forfeiture would not be exacted. Thompson v. Insurance Co., 140 U. S. 252. So recognizing this principle the court should look further than the provisions of the policy to ascertain if the insurer has by its conduct permitted the mortgagee to pay the premium upon demand and notice, if default is had by the insured, and if so such contract or course of conduct should be considered, together with the original policy, in order to determine if the policy was at the time claimed forfeited for non-payment of premium. As has been said, when the policy was issued by the company a mortgage clause was attached, executed by the company, and was made a separate contract with the plaintiff mortgagee to the effect that loss or damage, if any, under the policy, shall be paid to the plaintiff mortgagee as her interest may appear, and the policy shall not be invalidated by any act or neglect of the mortgagor, and in case the mortgagor shall neglect to pay any premium due

under the policy the mortgagee shall, on demand, pay the same, and the company reserves the right to cancel the policy at any time as provided by its terms, and in such case it shall continue in force for the benefit only of the mortgagee for ten days after notice to the mortgagee of such cancellation, and shall then cease.

These provisions of the mortgage clause of the contract, as we have seen, were not complied with by the company. There was no notice given to plaintiff of the neglect of the mortgagor to pay the premiums, or demand made upon her by the company to pay the same, or the ten days notice required to be given to her for the cancellation of the policy. In fact, she being in California at the time of the default in payment of the premiums had no knowledge of it, or that the policy was cancelled by the company, until after the property was destroyed by fire when she was then informed for the first time. She had a right to assume that under the provisions of the contract she had with the company the premiums had all been paid promptly and no cancellation was claimed by the company. Had the company complied with these terms of the mortgage clause contract, she could have protected her loan by either acquiring the mortgagor to secure other insurance, or done so herself. That was the purpose of the mortgage clause contract. The company failing to so comply with its contract with her becomes liable under the policy for the amount of the

loss and damage occasioned by the fire in the sum of $10,000. principal, and interest thereon from the date of its denial of liability, October 16, 1928. Intermountain Ass'n. of Credit Men v. Milwaukee Mechanics Ins. Co., 44 Ida. 491.

Accordingly judgment, with costs, may be entered for plaintiff.

And on July 2nd, Judgment was entered by the Clerk as follows:

(Title of Court and Cause)

No. 1393

JUDGMENT

This cause having come on regularly on the 29th day of April, 1929, the issues in this action being brought to trial before Honorable Charles C. Cavanah, United States District Judge, at a term of this court held at Boise, Idaho, the plaintiff appearing by her attorneys, W. D. Gillis and John W. Graham, and the defendant by its attorneys, Messrs. Bothwell & Chapman, a jury being waived, and the court having heard the allegations and proofs of the parties, and the arguments of counsel for said parties, and having taken the decision in said cause under advisement, and after due deliberation having duly made its decision in writing in favor of the plaintiff and against the defendant, now on said decision and on motion of W. D. Gillis, one of plaintiff's attorneys,

IT IS ORDERED, ADJUDGED AND DECREED, That plaintiff, Rosa M. Allen, recover of the defendant, General Insurance Company of America, a corpration of Seattle, Washington, the sum of $10,000.00, together with interest thereon from the 16th day of October, 1928, to this date at the rate of seven per cent (7%) per annum, or the sum of $495.80, together with costs of this action taxed at $————, or a total judgment in the sum of $————, and have execution therefor.

Judgment signed and entered this 2nd day of July, 1929, at——P. M.

.....

Clerk.

On July 11th, 1929, the following stipulation in writing was signed by respective counsel and filed, to-wit:

"It is stipulated and agreed by and between counsel for the respective parties to this action, as follows:

I.

That the opinion of the Court was filed in the cause on July 1st, 1929.

II.

That Counsel for Defendant received a copy of said opinion through the mail at Twin Falls, Idaho, on July 2nd, 1929.

III.

That the time may be extended up to and including August 1st, 1929, within which Counsel for Defendant may serve upon Counsel for Plaintiff, a draft of a proposed Bill of Exceptions, as provided by Rule 76 of the above entitled Court.

Dated this July 11th, 1929.

W. D. GILLIS
JOHN W. GRAHAM
Attorneys for Plaintiff,
Residence Boise and Twin Falls, Idaho.
JAMES R. BOTHWELL
W. ORR CHAPMAN
Attorneys for Defendant."

And the following order was made and filed on July 11th, 1929:

"Upon the written Stipulation of Counsel for respective parties being filed herein,

IT IS ORDERED that the time be, and the same is, hereby extended up to and including August 1st, 1929, within which Counsel for Defendant, may serve upon Counel for Plaintiff, a draft of a proposed Bill of Exceptions as provided by rule 76 of this Court.

Dated this 11th day of July, 1929.

CHARLES C. *CAVANAUGH*
Judge."

On July 11th, 1929, defendant moved that special findings be made by the Court and filed an affidavit

of James R. Bothwell in support of the motion. The motion and affidavit are as follows:

"MOTION

"Comes now the Defendant and moves, that special findings be made by the Court in this Cause.

This Motion is based upon the records, papers and files herein, together with the Affidavit of James R. Bothwell, one of the Attorneys for the Defendant.

JAMES R. BOTHWELL
W. ORR CHAPMAN
Attorneys for Defendant,
Residence Twin Falls, Idaho."

"STATE OF IDAHO,)
)ss
COUNTY OF ADA.)

James R. Bothwell being duly sworn, deposes and says; that he is one of the Attorneys for the Defendant in the above entitled action; that Defendant's case was submitted to the Court for decision upon a written brief, prepared in the office of Bothwell & Chapman at Twin Falls, Idaho, and filed with the Clerk of this Court; that in typewriting said brief, the operator inadvertently left out a request, which had been dictated to be included in said brief, asking that the Court make special findings in this cause and stated as a reason therefor, that in the opinion of Counsel for Defendant, under the pleadings and evidence in this cause, special findings were necessary, in order to fully and fairly under-

stand the facts, upon which a judgment of the Court would be based, and to adequately protect the rights of the Defendant upon appeal, should one be taken. And that said error was not discovered until after receipt of a copy of the decision of the Court by Counsel for the Defendant on July 2nd, 1929 at Twin Falls, Idaho.

Affiant further states, that in his opinion, special findings of fact are necessary to avoid injustice and to permit a full and fair hearing as to the sufficiency of the facts to sustain the decision of the Court and that this is a case wherein provisions of Rule 100, of this Court, should be applied.

JAMES R. BOTHWELL.

Subscribed and sworn to before me this 11th day of July, 1929.

B. F. NEAL
Notary Public,
Residence Boise,
Idaho."

"Service of the within Motion and Affidavit filed in support thereof, admitted by receipt of a true copy, this 11th. day of July 1929.

W. D. GILLIS.
JOHN W. GRAHAM.
Attorneys for Plaintiff,
Residence Boise and Twin Falls,
Idaho."

Objections to Defendants Motion for Special

Findings were filed on behalf of plaintiff on July 18th, 1929, as follows:

"OBJECTIONS TO MOTION OF DEFENDANT FOR SPECIAL FINDINGS.

COMES NOW the plaintiff, by and through her attorneys of record, and objects to this Court considering or granting the motion of the defendant above named for special findings, which motion is supported by the affidavit of James R. Bothwell, one of the attorneys of record for the defendant, said affidavit being dated the 11th day of July, 1929, for the following reasons:

1. That this Court has no jurisdiction at this time to consider or grant the prayer of said motion for the following reasons:

a. That no Written request, or request of any other kind or character, for special findings was made by the defendant herein to this Court prior to the entry of the judgment herein on the 2nd day of July, 1929, as required by Rule No. 63 of this Court.

b. That said motion and request for special findings of the defendant herein is insufficient in form and substance, even if the Court had jurisdiction to make the same.

2. That said motion and request for special findings is insufficient in law to require findings of any kind by this court.

3. That the reasons assigned for the request for findings, the same being made nine days after judgment herein, are frivial and show no legal excuse why the rules of this Court and particularly rule No. 63 should be modified or suspended.

Reference to the files and records in this case are hereto made and the same are made a part of these objections.

Dated this 17 day of July, 1929.

W. D. GILLIS,
Residence: Boise, Idaho.
JOHN W. GRAHAM
Residence: Twin Falls, Idaho.
Attorneys for Plaintiff.

Due and legal service of the above Objection is hereby acknowledged this 17th day of July, 1929.

JAMES R. BOTHWELL
W. ORR CHAPMAN.
Attorneys for Defendant."

Defendant's motion for special findings was denied on July 22, 1929, the order stating:

"Now, on this 22nd day of July, 1929, this cause coming on for hearing upon the motion of the defendant for special findings, filed in this court on the 11th day of July, 1929, together with the objections filed thereto by the plaintiff, and the court now being fully advised in the premises

IT IS ORDERED That said motion be and the same is hereby overruled and denied.

CHARLES C. CAVANAH
District Judge."

On July 26th, 1929 the following order was entered:

"Upon consideration,

IT IS ORDERED that the time be, and the same is hereby extended up to and including August 12th, 1929, within which counsel for defendant may serve upon counsel for plaintiff a draft of a proposed bill of exceptions as provided by Rule 76 of this Court.

Dated: Boise, Idaho, July 26th, 1929.

CHARLES C. CAVANAH.
District Judge."

Whereupon, on July 30th, 1929 the defendant made the following request in writing which was filed and presented to the Court:

"REQUEST FOR DECLARATION OF LAW IN FAVOR OF DEFENDANT.

And now comes the defendant herein during the term at which judgment was rendered in favor of plaintiff and against the defendant and requests a declaration of law as follows:

"The court declares the law to be that under the pleadings, contract of insurance and evidence in this case, the plaintiff is not entitled to recover against the defendant, General Insurance Company of

America, and the decision and judgment of the court is in favor of the defendant."

Dated this 29th day of July, 1929.

JAMES R. BOTHWELL.
W. ORR CHAPMAN.
Attorneys for Defendant,
Residing at Twin Falls, Idaho.

Service of the within Request for Declaration of Law in Favor of Defendants this 29th day of July, 1929, by receipt of a copy thereof.

W. D. GILLIS.
JOHN W. GRAHAM.
Attorneys for Plaintiff."

Objections to defendant's Request for Declaration of Law in favor of defendant were filed on behalf of plaintiff on July 30th, 1929, as follows:

"COMES NOW The plaintiff, by and through her attorneys of record, and objects to this Court considering or granting the request of the defendant above named for declaration of law in favor of defendant for the following reasons:

1. That this Court has no jurisdiction at this time to consider or grant the prayer of said request for the following reasons:

a. That no written or oral request for declaration of law in favor of defendant was made by the defendant herein to this court prior to the entry of the judgment herein on the 2nd day of July, 1929.

b. That said request for declaration of law for and in behalf of the defendant is insufficient in form and substance.

2. That no valid reason or excuse has been assigned for the request being made at this time.

Dated this 30th day of July, 1929.

W. D. GILLIS,
Residence: Boise, Idaho.
JOHN W. GRAHAM.
Residence: Twin Falls, Idaho.
Attorneys for Plaintiff."

and said request was entertained by the Court and denied by Order entered on July 30th, 1929. At the time the Court ruled on defendant's said request, defendant excepted to the ruling of the Court and moved for an order allowing defendant's exception and fixing the time within which a bill of exceptions may be reduced to writing. Defendant's exception in writing and motion for an order allowing the exception and fixing the time within which a bill of exceptions may be reduced to writing, and the order of the Court are in words and figures as follows, to-wit:

"EXCEPTION AND MOTION

And now comes the defendant at the time the ruling is made by the court upon defendant's request for a declaration of law "that under the pleadings, contract of insurance and evidence in this case

the plaintiff is not entitled to recover against the defendant, General Insurance Company of America, and the decision and judgment of the court is in favor of the defendants," and excepts to to the ruling of the court denying said request, and moves for an order allowing defendant's exception to said ruling and fixing the time within which a Bill of Exceptions herein may be reduced to writing and settled and signed by the Judge of this Court and granting defendant until and including Aug. 12, 1929 from this date within which to serve upon the attorneys for the plaintiff a draft of a proposed Bill of Exceptions herein.

Dated this 30th day of July, 1929.

JAMES R. BOTHWELL.
W. ORR CHAPMAN.
Attorneys for Defendant,
Residing at Twin Falls, Idaho."

"ORDER

"And now on this day defendant's request for a declaration of law "that under the pleadings, contract of insurance and evidence, plaintiff is not entitled to recover and the decision and judgment of the court is in favor of the defendant" is denied and the defendant thereupon excepting to the ruling of the court and requesting the court to fix the time within which a Bill of Exceptions to said ruling may be reduced to writing and settled and signed by the

judge of this court. Upon consideration it is ORDERED that defendant may have an exception to the ruling of the court denying its said request and that a Bill of Exceptions to the court's ruling on defendant's said request may be reduced to writing and settled and signed by the Judge of this court as provided by Rule 76 of this court; and it is further ORDERED that the defendant may have until and including August 12th, 1929 within which to serve upon the attorneys for plaintiff a draft of the proposed Bill of Exceptions herein as provided by said Rule 76 of this court.

Dated and signed this 30 day of July, 1929.

CHARLES C. CAVANAH
Judge."

Upon his own motion, the Court entered the following Nunc Pro Tunc Order Correcting Judgment on July 30th, 1929:

"A judgment was entered in the above entitled case on the 2nd day of July, 1929, in the sum of $10,000.00, together with interest thereon from the 16th day of October, 1928, to the 2nd day of July, 1929, at the rate of 7% per annum in the sum of $495.80, and it appearing to the court that the annual premium on the policy of insurance in question due September 20, 1926, and that the annual premium due September 20, 1927, in the sum of $130.40 for each year had not been paid by the mortgagee or the mortgagor herein and that the

defendant is entitled to a credit on said judgment and interest for said two years' annual premium with interest from the date that said annual premium fell due to July 2nd, 1929, at 7% per annum in the sum of $302.46, principal and interest, and a mistake was made in not allowing said credit upon said amounts so found due the plaintiff and that the judgment so entered on the 2nd day of July, 1929, should have contained a provision for said credit in the sum of $302.36 and that said judgment should be corrected in that regard by a Nunc Pro Tunc order as of the date of July 2nd, 1929:

It is Therefore Ordered and Adjudged that the judgment entered in said above entitled cause on the 2nd day of July, 1929, be, and the same is hereby, amended by inserting after the words "on the sum of $495.80" on the second line of the second page of said judgment the following: "Less a credit in the sum of $302.36, being premium and interest on policy for two years to July 2nd, 1929, leaving a net balance due from the defendant to the plaintiff herein for principal and interest in the sum of $10,193.44".

It Is Further Ordered and Adjudged that said amendment shall take effect as of July 2, 1929, the date of the entry of said judgment.

Dated this 30th day of July, 1929.

CHARLES C. CAVANAH.
District Judge."

The following Petition for a New Trial on behalf of defendant was served upon counsel for plaintiff on July 31st, and filed on August 1st, 1929, to-wit:

"And now comes the defendant, General Insurance Company of America, and petitions the court that the opinion and decision of the court filed in this cause and the judgment made and entered in favor of plaintiff and against the defendant on July 2nd, 1929, be set aside and a new trial be granted upon the following grounds:

1. Errors in law occurring at the trial namely:

(a) The court erred in overruling defendant's demurrer to plaintiff's complaint;

(b) The court erred in finding generally in favor of plaintiff and against defendant for the reason that the defendant is entitled to a declaration of law in this case as follows: "the court declares the law to be that under the pleadings, contract of insurance and evidence in this case the plaintiff is not entitled to recover against the defendant, General Insurance Company of America, and the decision and judgment of the court is in favor of the defendant";

(c) The court erred in admitting evidence over the objection of counsel for defendant as specifically set forth in Exhibit "A" hereunto annexed and made a part hereof;

(d) The court erred in ordering judgment entered in favor of plaintiff and against the defendant without a provision contained in the judgment "that

upon payment of said judgment to the mortgagee the defendant shall, to the extent of such payment, be subrogated to all of the rights of the mortgagee, and that the defendant shall receive a full assignment and transfer of the mortgage and all other securities held by plaintiff," as provided in Condition 5 of the mortgage clause attached to the insurance policy in question.

2. Insufficiency of the evidence to justify the decision, and that the decision is against law in the following particulars:

(a) The evidence shows without contradiction that plaintiff appointed R. A. Reynolds as her agent with full power to insure the property in question, to select the insurer and to surrender the policy in question for cancellation to the agent of defendant;

(b) The uncontradicted evidence shows that R. A. Reynolds, agent of plaintiff, surrendered the policy in question to defendant's agent for cancellation and notified defendant's agent in writing that the insurance upon the property had been placed with the Hardware Mutual Insurance Company;

(c) The evidence shows without contradiction that plaintiff knew, or could have known by the exercise of ordinary care, that her agent, R. A. Reynolds, had not placed the policy in question in her safety deposit box in the First National Bank of Filer, Idaho, and that plaintiff allowed the policy to remain out of the safety deposit box and under the control of plaintiff's agent, R. A. Reynolds, and

thereby placed within his control to surrender the policy for cancellation;

(d) The evidence shows, without contradiction, that the plaintiff had no dealings whatever with defendant except through R. A. Reynolds, and plaintiff having received the benefits of insurance for the years 1924 and 1925 through the contract of insurance secured by the said R. A. Reynolds is now estopped from denying that Reynolds was her agent and was acting within the scope of his authority when he surrendered the policy for cancellation;

(e) The uncontradicted evidence shows that the immediate cause of cancellation of the policy was the failure of Reynolds to place the policy in the safety deposit box in the First National Bank of Filer, but on the contrary retaining the policy in his possession and thereafter surrendering the policy to defendant's agent, with a statement in writing that the policy had been replaced in the Hardware Mutual Company, and the uncontradicted evidence further shows that plaintiff opened the safety deposit box and knew, or by the use of her natural senses could have known, that the policy was not, in fact, in the safety deposit box, and that at the time the mortgagors were in default upon the mortgage, and plaintiff is, therefore, estopped from contending that the policy was not surrendered for cancellation with her knowledge and consent;

(f) The evidence shows without contradiction that the surrender of the policy for cancellation by

R. A. Reynolds, as "was not an act or neglect of the mortgagor," whereby the policy was invalidated within the meaning of the mortgagee clause attached to the policy, but was an act in furtherance of the agreement between plaintiff and R. A. Reynolds that Reynolds would keep the building insured, select the insurer, pay the premiums, replace the insurance in a company to the mutual advantage of plaintiff and mortgagors and place the policy in the First National Bank at Filer, Idaho;

(g) It is shown by the uncontradicted evidence that plaintiff ratified the act of R. A. Reynolds in surrendering the policy for cancellation and prior to the loss;

(h) It is shown upon the uncontradicted evidence that the term of insurance under the policy in question was from 12 o'clock Noon on September 20, 1924, to 12 o'clock Noon September 20, 1925, and from 12 o'clock Noon, September 20, 1925, to 12 o'cock Noon September 20, 1926, and that said policy of insurance expired at Noon on September 20, 1926, and was not renewed for the year September 20, 1926, to September 20, 1927, and was not in effect on the date of the loss of the building in question by fire.

3. The decision is against law for all of the reasons as stated above that the evidence is insufficient to justify the decision.

The application for a new trial in this case is to be made upon the pleadings, minutes of the court,

evidence produced at the trial, exhibits, reporter's transcript of his shorthand notes and the refusal of the court to grant defendant's request for a declaration of law as follows: "The court declares the law to be that under the pleadings, contract of insurance and evidence in this case the plaintiff is not entitled to recover against the defendant, General Insurance Company of America, and that the decision and judgment of the court is in favor of the defendant," and upon the court's refusal to make special findings in this cause.

Dated this 31st day of July, 1929.

JAMES R. BOTHWELL.
W. ORR. CHAPMAN.
Attorneys for Defendant."

On August 8th, 1929, the following Order was entered by the Court:

"Upon consideration,

IT IS ORDERED, that the time be and the same is hereby extended up to and including August 15th, 1929, within which counsel for defendant may serve upon counsel for plaintiff a draft of a proposed bill of exceptions as provided by Rule 76 of this Court.

IT IS FURTHER ORDERED that time be and the same is hereby extended up to and including August 15th, 1929, within which counsel for defendant may serve upon counsel for plaintiff draft of proposed bill of exceptions covering denial by the

Court of defendant's request for a declaration of law, filed in the above entitled cause on July 30th, 1929.

Dated; Boise, Idaho, this 8th day of August, 1929.

CHARLES C. CAVANAH.
District Judge."

(Title of Court and Cause)

No. 1393

COPIES OF EXHIBITS

PLAINTIFF'S EXHIBIT NO. 1
ADMITTED

THIS INDENTURE, Made this 29th day of November, in the year of our Lord one thousand nine hundred and fifteen between Henry Jones and Willmoth Jones, his wife, of Hollister County of Twin Falls, State of Idaho, the parties of the first part, and Richard A. Reynolds and Charles L. Reynolds, co-partners doing business under the firm name of Filer Hardware Company, of Filer, County of Twin Falls, State of Idaho, parties of the second part.

WITNESSETH, That the said parties of the first part, for and inconsideration of the sum of One and No/100 Dollars of the United States of America, to them in hand paid by the said parties of the second

part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, and sell, convey and confirm unto the said parties of the second part, and to their heirs and assigns forever, all the following described real estate, situated in Twin Falls County, State of Idaho, to-wit:

Lots Eighteen (18), Nineteen (19), Twenty-seven (27), Twenty-Eight (28) and Twenty-Nine (29) in Block Fourteen (14) in the village of Filer, as shown by the final and amended plat of Filer Townsite now on file in the office of the recorder for Twin Falls County, Idaho.

This deed is given as a correction deed to correct deed given July 17th, 1915, by the grantors herein covering lots herein described and recorded Nov. 27, 1915.

TOGETHER With all and singular the tenements, hereditaments, and appurtenances thereunto belonging and in anywise appertaining, the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all estate, right, title and interest in and to the said property, as well in law as in equity, of the said parties of the first part.

TO HAVE AND TO HOLD, All and singular the above mentioned and described premises, together with the appurtenances, unto the parties of the second part, and to their heirs and assigns forever.

And the parties of the first part and their heirs, the said premises in the quiet and peaceable possession of the said parties of the second part, their heirs and assigns, against the said parties of the first part, and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim same shall and will WARRANT and by these presents forever DEFEND.

IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in the
Presence of
F. C. Graves

Henry Jones (Seal)
Willmoth Jones (Seal

STATE OF IDAHO)
)ss
County of Twin Falls)

On this 29th day of November in the year 1915, before me W. Homer Craven, a Notary Public in and for said State, personally appeared Henry Jones and Willmoth Jones, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed my official seal, the day and year in this certificate first above written.

W. Homer Craven
Notary Public

My commission expires on the 27th day of Jul. 1918

(W Homer Craven Notary Public)
( )
(Twin Falls County, Idaho)

STATE OF IDAHO)
)ss
Coounty of Twin Falls)

CERTIFICATE OF TRUE COPY - RECORDER

I, Harry C. Parsons, Ex-officio Recorder, in and for Twin Falls County, State of Idaho, do hereby certify that the hereto annexed is a full, true and correct copy of the original warranty deed from Henry Jones and Willmoth Jones, his wife, to Richard A. Reynolds and Charles L. Reynolds co-partners doing business under the firm name of Filer Hardware Company, as same appears on the records of said Twin Falls County, in Book 34 of Deeds, at page 248.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this 15th day of April A. D., 1929.

(Sgd.) Harry C. Parsons
Ex Officio Recorder

(Sgd.) By Dorothy McRill, Deputy

(ENDORSEMENTS)

WARRANTY DEED.

Henry Jones and
Willmoth Jones his wife
to
Richard A. Reynolds and
Charles L. Reynolds

STATE OF IDAHO)
)ss
County of *Idaho*)

I h e r e b y certify that this instrument was filed for record at request of A. D. Hughes
at 48 minutes past 10
o'clock A.M., this 18th day of
February, A.D., 1916, in my office
and duly recorded in Book 34 of Deeds
at Page 248

E. J. Finch
Ex-Officio Recorder

Fees $1.25.

PLAINTIFF'S EXHIBIT NO. 3
ADMITTED

AGENT'S RECORD.
GENERAL INSURANCE COMPANY OF AMERICA
Seattle, Washington

INSURANCE MAP

This space reserved for Company's Use
TOTAL NET LINE

No. 1D601926
Renews No. new
Cancels No.
Assured's Mailing Address.
Filer, Idaho

On same Within 100 feet Sheet 5
$..... $..... Block 29
Recorded..... Street No. 204
Mapped..... Page 1 Line 13
Amt.Reinsured.....
P.M.L.....

This Space reserved for Company's use
Agent's No. Quar City County State Dept. Class Prot. Con. Div.

Amount $10,000.00 Rate 1.63 Premium $130.40

IN CONSIDERATION of the stipulations herein named and of One Hundred Thirty and 40/100 Dollars First Annual Premium and by the payment of the then current annual premium of this Company, at or before 12 o'clock noon, on or before the 20th

day of September in every year, renewing from year to year within said term, does insure C. L. and R. A. Reynolds for the term of five years from the 20th day of September, 1924, at noon, to the 20th day of September, 1929, at noon, against all direct loss or damage by fire except as hereinafter provided, TO AN AMOUNT NOT EXCEEDING Ten Thousand and no/100 Dollars on the following described property, while located and contained as herein described, and not elsewhere to-wit:
Standard Forms Bureau Form 76

BUILDING FORM (MERCANTILE)

On the following described property, all situate on the northwest corner of Main Street and Park Avenue, Sanborn Fire Map Sheet 5, Block 29, Street No. 204, Filer, Idaho.

1. $10,000.00 On the two story comp. roof brick building and its additions (if any) of like construction communicating and in contact therewith, including foundations, sidewalks, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only while occupied for hardware & implement store, and dance hall purposes

2. $ nil On.....

3. $ Nil On.....

No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item.

Other insurance permitted

Loss, if any, subject however to all the terms and conditions of this policy, payable to assured

"Tenants' Improvements" spearately insured for a specific amount under this, or any other policy, are not covered by this policy except for such specific amount, if any, named herein.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. ID-601926 of the General Insurance Company. Agency at Filer Idaho. Dated September 20th, 1924

Insurance Map
Sheet 5
Block 29
204

(Sgd) Arthur E. Anderson
Agent

For other provisions see reverse side of this rider.

(Following on back of foregoing rider)

Provisions Referred to in and Made Part of this Rider No. 76.

"Vacancy." If building described hereunder is located within the incorporated limits of a city or town, permission is hereby granted for same to remain vacant or unoccupied without limit of time.

"Permits". Permission granted to make alteration or repairs to the above described building without limit of time, and to build additions, and if of like construction and communicating and in contact therewith, this policy shall cover on same under its respective items pertaining thereto; permission also granted to do such work in said building as the nature of the occupancy may require; to work at any and all times; and, when not in violation of law of ordinance, to generate illuminating gas or vapor, and to keep and use the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said building, it being warranted by insured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such breach. But notwithstanding anything herein contained, the use, keeping, allowing, or storing on the within described premises of dynamite, fireworks, Greek fire, gunpower in excess of fifty pounds, nitro glycerine or other explosives is prohibited and shall wholly suspend this policy during the period such use, keeping allowing or storing shall continue unless a specific permit therefor is attached to this policy.

"Lightning Clause" This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term "lightning" and in no case to include loss or damage by cyclone, tornado, or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; provided, however, that if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

"Electrical Exemption Clause." If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are inusred by this policy, this insurance shall not cover any immediate loss or damage to d y n a m o s, exciters, lamps, motors, switches, or any other apparatus for generating utilizing, testing, regulating, or distributing electricity, caused directly by electric currents therein whether artificial or natural.

Standard Forms Bureau Form 371.

MORTGAGEE CLAUSE WITH FULL CONTRIBUTION

(To be attached only to policies covering buildings.)

Loss or damage, if any, under this policy, on buildings only, shall be payable to Rose M. Allen

Mortgagee (or Trustee) as interest may appear. Subject to all the terms and conditions hereinafter set forth in this rider, this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

Condition One—In case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Condition Two—The mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

Condition Three—This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall

then cease; and this company shall have the right, on like notice to cancel this agreement.

Condition Four—In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

Condition Five—Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of her claim.

Attached to Policy 1D-601926 of the General Insurance Company.

Issued to C. L. and R. A. Reynolds

Agency at Filer, Idaho

Dated, September 20th, 1924.

(Sgd.) Arthur E. Anderson,
Agent.

GENERAL INSURANCE COMPANY OF AMERICA

AGENTS INSPECTION REPORT AND POLICY ORDER.

Assured C. L. and R. A. Reynolds Address Filer, Idaho

Amount $10,000.00 Rate $1.63. Premium $130.00 Policy No.ID601926.

Covers on $10,000.00 on two story brick building with composition roof.

Location on the northwest corner of Main St. and Park Ave., Sanborn Fire Map Sheet 5, Block 29, Street No. 204, Filer, Idaho.

Name and Address of Mortgagee Rose M. Allen c/o G. H. Shearer, Filer, Ida.

Term 5 years Effective Sept. 20, 1924. Deliver Policy to.....

QUESTIONS TO BE ANSWERED ON ALL RISKS.

1. Construction of Building Brick
2. Kind of Flues Brick
3. Do any stove pipes, terra cotta, tile or cement flues pass thru partitions, floor ceilings or roof? No.

State which?.....If so, how secured, how near wood.....

4. Are all flues & stove pipes in safe condition Yes
5. Are there any unprotected vertical openings between basement and first floor, what No.
6. What is moral standing of assured Excellent
7. Is there any other insurance on this property No.
8. Is assured sole owner of the property assured Yes.
9. If not, what is his title.....
10. Is property in litigation or dispute No.
11. How long has assured resided here 17 years
12. Is risk on graded street on paved street.
13. How far from hydrant across street
14. How far from fire Dept. 1½ blocks
15. Is wiring in good condition yes
16. Any electric cords hung on metal of any kind No.
17. Are empty boxes, barrels, rubbish permitted to accumulate in rear of building No
18. Has assured ever had a fire yes
19. If so, give details Filer Hdw. Co. Inc., burned about four years ago.
20. Has any company ever cancelled or rejected assured's risks No.
21. Have you personally examined risk Yes
22. What date 8/11/24 If insured, state value

of personal property $..... Is it encumbered.....

23. Do you unqualifiedly recommend this risk as up to the standard required by the General Insurance Company of America Yes

QUESTIONS TO BE ANSWERED ON MERCANTILE BUILDINGS AND DWELLINGS.

1. When built about 1918
2. Present value about $25,000
3. Present condition good
4. Kind of roof composition
5. Kind of Foundation concrete.
6. When last painted.....
7. Number of rooms, except halls, closets, bath.....
8. Are all rooms finished.....
   How .....
9. Fitted with bath.....
10. How lighted electricity
11. How heated hot water heat
12. Is there a basement yes
13. Size 15 ft. x 25 ft. x.....ft.
14. How floored not floored

Dimensions of Main Building.

15. ..... story.....ft.x.....ft.
    x.....Studding.
    Wing.....story..... x ..... x .....
    Studding

Addition size..... x ..... x .....
Studding

16. Size of porches.....

OCCUPANCY OF BUILDING.

Basement Hot water boiler 1st Floor Hardware & implement 2nd Floor Dance Hall
Other floors.....by owner of tenant
.....

If tenant, state monthly rental received $.....
(Mezz. floor: doctors' offices.)

QUESTIONS TO BE ANSWERED ON MERCANTILE STOCKS

1. How often is inventory taken.....
2. When was last one.....
3. What was value of stock then.....
4. What is present value of stock.....
5. What is amount of annual sales.....
6. Are books kept of purchase.....
7. Is sales record kept.....
8. Will records be kept in iron safe.....
9. How long has assured conducted this business
.....
10. Did they start with new stock or buy out some one.....

DESCRIPTION OF BARNS, GRANARIES, OUTBUILDINGS ON FARMS

1. Frame, box or post.....
2. Outside, finished or rough.....

3. When built.....
4. General condition.....
5. Cost to build.....
6. Present value.....

Dimensions (measure from base to eaves)
Main Building..... ft.x ..... x ft.
.....Posts. 1st Shed.....ft x .....
ft x ..... Posts. 2nd shed&&.....
ft x .....Posts

Barn No. 2 Gave same information.....

Granary

1. When built..... 5. Kind of Roof.....
2. Is it Frame..... Length.....
3. Is it painted..... 6. Present value.....
4. Outside, finished or Width.....
rough.....Dimensions Height.....

Remarks .....

If risk is not mapped draw diagram of risk and exposing buildings, showing distance in feet between buildings

Show how rate is computed if not specially rated
Rate according to book no.....

1. Basis .....$
2. Exposure charges .....$
3. Deficiency charges .....$
4. Concrete flue .....$
5. Cloth lining .....$.....

Total Rate .....$.....

Special Rate Page Line.....

6. Has this Company any other insurance in block? If so, give amount, name, policy No. Policy No. ID-601925 in favor of Reynolds Bros. for $3,000.

Filer Idaho Agency

Inspected by (Sgd) Arthur E. Anderson

PLAINTIFF'S EXHIBIT NO. 4
ADMITTED

Filer, Idaho. March 2, 1926 Check No. 4770

To FIRST NATIONAL BANK, Filer, Idaho

FILER HARDWARE CO., Inc. Hardware, Furniture, Implements. Filer, Idaho $197.96

PAY- - - - One Hundred Ninety-Seven Dollars and Ninety-Six Cents

To the Order of F. C. Graves

FILER HARDWARE CO. Inc.
(Sgd.) R. A. Reynolds,
Agent

(INDORSEMENTS)

For deposit only

F. C. GRAVES

By R. F. G.

PLAINTIFF'S EXHIBIT NO. 5
ADMITTED

Filer, Idaho March 2, 1926 Check No. 4770

Voucher No. .....

To FIRST NATIONAL BANK

FILER HARDWARE CO., Inc. Hardware, Furniture, Implements. Filer, Idaho $197.96

Record of Payment One Hundred ninety-seven Dollars Ninety-six Cents

Made to F. C. Graves DUPLICATE.

FILER HARDWARE CO., Inc. Est.
By R. A. Reynolds
Agent

Detach statement before depositing

FILER HARDWARE CO., Inc.

Filer, Idaho

When detached and paid the above check becomes a receipt in full payment of the following account
No other receipt necessary
Discount Other Deductions

Date for	Description amount	Amount net amt.	c/o Amount

Insurance $197.96
Gager Dwelling Filer $15.00
Charge to Ins.Expense
Postoffice Bldg. 52.56
Roof Garden Bldg. 130.40

Chg. to a/c R.A. & C.L.Reynolds

(INDORSEMENTS)

Distribution

Account	Detail	Amount
86 Insurance		$15.00
17 Ac. R.	(?) (not decipherable)	182.96
		$197.96

(Following attached to foregoing Exhibit 5)

STATEMENT

Reynolds Bros.

Twin Falls, Idaho

F. C. GRAVES,

Real Estate, Loans, Insurance.

Acc. C. R. & R. A. Reynolds, Insurance

May 20	Dwelling Gager Res. Filer	$15.00
Sept. 1.	Postoffice Building	52.56
Sept. 19.	Roof garden building	130.40
		$197.96

Acc. R. A. Reynolds, Agent

Feb. 12, Castleford Building	$ 43.50
Feb. 12, Stock, Twin Falls Store	160.00
	$ 203.50

PLAINTIFF'S EXHIBIT NO. 6
ADMITTED

$2525.95

Due June 20th, 1922 Twin Falls, June 20th, 1919

Three years after date I, we, or either of us promise to pay to the order of Rose M. Allen Two Thousand Five Hundred Twenty-Five and 95/100--Dollars for value received at the First National Bank, Filer, Idaho, with interest thereon at the rate of seven percent per annum from date payable annually in United States gold coin, with a reasonable sum as attorney's fees, if this note is collected by an attorney, either with or without suit.

(Sgd.) Richard A. Reynolds
" Dorothy Reynolds
" Charles L. Reynolds
" Helen J. Reynolds

Address Filer Idaho

(INDORSEMENTS)

Jul. 15, 1920, Interest paid to June 20, 1920
Oct. 15th, 1921 " " " June 20, 1921
June 20th, 1923 " " " " " 1922
" " " " " " " 1923

" " 1924
" " 1925
" " 1926
Oct. 20th, 1927 " " " " " 1927
(52c Revenue Stamps Attached)

(PLAINTIFF'S EXHIBIT NO. 7 ADMITTED)

$2525.95

Due June 20th, 1923 Twin Falls, Idaho, June 20th, 1919

Four years after date, I we or either of us promise to pay to the order of Rosa M. Allen Two Thousand Five Hundred Twenty-Five and 95/00----Dollars for value received at the First National Bank, Filer, Idaho, with interest thereon at the rate of seven per cent per annum, from date, payable annually in United States gold coin, with a reasonable sum as attorney's fees, if this note is collected by an attorney, either with or without suit.

(Sgd.) Richard A. Reynolds
" Dorothy Reynolds
" Charles L. Reynolds
" Helen J. Reynolds

Address Filer, Idaho.

(INDORSEMENTS)

Jul. 15, 1920, Interest paid to June 20, 1920
Oct. 15th, 1921 " " " June 20, 1921

June 20th, 1923 " " " " " 1922
" " " " " " " 1923
" " " 1924
" " " " " " " 1925
" " " 1926
Oct. 20th, 1927 " " " " " 1927

(52c Revenue Stamps Attached)

(PLAINTIFF'S EXHIBIT NO. 8 ADMITTED)

Due June 20th, 1924 Twin Falls, Idaho, June 20th, 1919.

Five years after date, I, we, or either of us promise to pay to the order of Rosa M. Allen Two Thousand Five Hundred Twenty-five and 95/100----Dollars for value received, at the First National Bank, Filer, Idaho, with interest thereon at the rate of seven per cent per annum, from date, payable annually in United States gold coin, with a reasonable sum as attorney's fees, if this note is collected by an attorney, either with or without suit.

(Sgd.) Richard A. Reynolds
Dorothy Reynolds
Charles L. Reynolds
Helen J. Reynolds

Address Filer, Idaho

(INDORSEMENTS)

July 15th, 1920, Interest paid to June 20, 1920
Oct. 15th, 1921 " " " June 20, 1921

June 20th, 1923	"	"	"	"	"	1922
"	"	"	"	"	"	1923
				"	"	1924
"	"	"	"	"	"	1925
				"	"	1926
Oct. 20th, 1927	"	"	"	"	"	1927

(52c Revenue Stamps Attached.)

PLAINTIFF'S EXHIBIT NO. 9
ADMITTED

Filer, Idaho, August 26th, 1921

On or Before January 1st, 1922, after date, for value received, and without grace, I, we, or either of us promise to pay to the order of Rosa M. Allen of Filer, Idaho, $2.000.00 Two Thousand and no/100----Dollars in lawful money of the United States of America, at Reynolds Brothers Company of Filer, Idaho, with interest thereon in like money from date until paid, at the rate of 7% percent per annum. Interest to be paid when due and if not so paid the whole sum of both principal and interest to become immediately due and collectible. Should this note be collected by an attorney, with or without suit, a reasonable attorney's fee shall be allowed the holder. The sureties, guarantors and endorsers of this note severally waive presentation for payment, protest and notice of protest.

(Sgd.) R. A. and C. L. Reynolds
per R. A. Reynolds

(INDORSEMENTS)

Rec'd interest in full to June 20th, 1923, amt. $363.29

6/20/26 Rec'd. interest in full to June 20th, 1926

6/20/26 Rec'd. on price of water note.....$93.89

(40c Revenue Stamps Attached)

PLAINTIFF'S EXHIBIT NO. 10
ADMITTED

THIS INDENTURE, made this 20th day of June in the year of Our Lord one thousand nine hundred and Nineteen between Richard A. Reynolds and Dorothy Reynolds, his wife, and Charles L. Reynolds and Helen Reynolds, his wife of Filer, County of Twin Falls, State of Idaho, the parties of the first part, and Rosa M. Allen of Filer, County of Twin Falls, State of Idaho, the party of the second part,

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of Twelve Thousand Six Hundred and Twenty-nine and 73/100 ($12,629.73) Dollars, lawful money of the United States, do by these presents GRANT, BARGAIN, SELL and CONVEY unto the said party of the second part, and to her heirs and assigns FOREVER, all that certain real property situate in the County of Twin Falls and State of Idaho, and bounded and particularly described as follows, to-wit:

Lots Twenty-eight (28) and Twenty-nine (29) in Block Fourteen (14) in the village of Filer, Twin Falls County, State of Idaho, according to the Final and Amended Plat thereof on record in the Recorder's office of said county, together with the tenements, hereditaments, and appurtenances thereto belonging or in any wise appertaining.

THIS GRANT is intended as a Mortgage to sesure the payment of five certain promissory notes of even date herewith, executed and delivered by the said Richard A. Reynolds and Dorothy Reynolds, his wife, and Charles L. Reynolds and Helen Reynolds, his wife, to the said party of the second part. These notes are all for the principal sums of $2525.95 each and due as follows: One on June 20, 1920, one on June 20, 1921; one on June 20, 1922; one on June 20, 1923 and one on June 20, 1924; all bearing interest at the rate of 7% per annum, said interest to be paid annually.

And these presents shall be void if such payment be made. But in case default shall be made in the payment of the said principal sums of money or any part thereof as provided in the said notes, or if the interest be not paid as therein specified, or if the taxes, water maintenance, or payments of principal or interest on any prior lien or incumbrance be not paid, second party shall have the right to pay the same, and then it shall be optional with the said party of the second part, her executors, administrators or assigns, to consider the whole of

said principal sums expressed in said notes as immediately due and payable; and immediately to enter into and upon all and singular the above described premises and to sell and dispose of the same according to law, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said promissory notes, together with the costs and charges of foreclosure suit, including reasonable counsel fees and also the amounts of all such payments of taxes, assessments, incumbrances or insurance as may have been made by said second party, her heirs, executors or assigns, with the interest on the same at the rate of 7 per cent per annum, rendering the overplus of the purchase money (if any there shall be) unto the said parties of the first part, their heirs, executors, administrators or assigns.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Sgd.) Richard A. Reynolds (Seal)
" Dorothy Reynolds (Seal)
" Charles L. Reynolds (Seal)
" Helen J. Reynolds (Seal)

Signed, Sealed and Delivered in the Presence of
(Sgd.) H. C. Hazel.

STATE OF IDAHO)
)ss
County of Twin Falls)

On this 20th day of June, 1919, before me H. J.

Benoit, a Notary Public in and for said county personally appeared Richard A. Reynolds and Dorothy Reynolds, his wife, and Charles L. Reynolds and Helen Reynolds, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

(Sgd.) H. J. Benoit
(Seal) Notary Public, Twin Falls, Idaho.

(INDORSEMENTS)
No. 107970

MORTGAGE
Richard A. Reynolds, et al
to
Rosa M. Allen,
STATE OF IDAHO,)
)ss
County of Twin Falls)

I hereby certify that this instrument was filed for record at the request of Hazel and Benoit at 18 minutes past 4 o'clock P. M., this 20 day of June, 1919, in my office and duly recorded in Book 57 of Mtgs.at page 420.

(Sgd.) C. C. Siggins
Ex-Officio Recorder
By John F. Hansen, Deputy

Fee $1.50 Pd.

Return to Mrs. R. M. Allen, Filer, Ida.

(PLAINTIFF'S EXHIBIT NO. 12
ADMITTED)

(Title of Court and Cause)

NOTICE TO PRODUCE ORIGINALS

TO GENERAL INSURANCE COMPANY OF AMERICA, defendant above named, and JAMES R. BOTHWELL and W. ORR CHAPMAN, its attorneys of record:

You, and each of you, are hereby notified to produce and have in court, in the Federal Court Room, in Federal Court Building in Boise, Idaho, on the 29th day of April, 1929, at 10 o'clock A. M. of said day, the same being the time that said above entitled cause has been set for trial, the following documents, instruments and papers, to-wit:

1. The original letter written by W. D. Gillis of Filer, Idaho, then attorney for plaintiff in said above entitled action, dated Sept. 20, 1928, to defendant company.

2. The original letter written by W. D. Gillis of Filer, Idaho, then attorney for plaintiff in the above entitled action, dated October 1, 1928, to the defendant company.

3. The original letter written by W. D. Gillis of Filer, Idaho, attorney for plaintiff herein, dated Oct. 11, 1928, to the defendant company.

4. The original proof of loss mailed to defendant on Oct. 11, 1928, by W. D. Gillis of Filer, Idaho, attorney for plaintiff.

Dated this 11th day of April, 1929.

(Sgd.) W. D. GILLIS, Res. Boise, Ida.
JOHN W. GRAHAM, Res. Twin Falls
Attorneys for Plaintiff

(PLAINTIFF'S EXHIBIT NO. 13
ADMITTED)

W. D. GILLIS,
Lawyer,
Filer, Idaho.
September 20th, 1928.

General Insurance Company of America,
Seattle, Washington

Gentlemen:

Under your policy ID601926 you covered C. L. and R. A. Reynolds for $10,000.00 on the following described property, all situate on the Northwest corner of Main St. and Park Av. Sanborn Fire Map Sheet 5, Block 29, Street No. 204, Filer, Idaho.

This policy also provided under a mortgage clause that the loss or damage, if any shall be payable to Rose M. Allen, Mortgagee.

On August 29th, 1928, at about the hour of 2 A.

M. this property was totally destroyed by fire. Notice of such loss has been served upon your representatives F. C. Graves and Son, Filer, Idaho, who advise that our insurance had lapsed.

We are desirous of filing proof of loss to present our claim to you under conditions covered by the policy contract and the provisions of the mortgage clause, and we therefore hereby ask that you either send your adjuster to review our claim or else send us a blank proof of loss, that we may complete at this end and file with you for further reference and action.

Trusting this may have your prompt attention, I am,

Very truly yours,
(Sgd.) W. D. Gillis,
Attorney for C. L. and R. A. Reynolds
and Rosa M. Allen.

WDG-GS
Register

PLAINTIFF'S EXHIBIT NO. 14
ADMITTED

Directors
O. D. Fisher, Chairman
J. A. Humbird
Frank B. Martin
A. W. Middleton
Henry McCleary
W. L. McCormick

Cable Address
(General)

J. P. McGoldrick
Geo. J. Osgood
C. D. Stimson
W. H. Talbot
H. D. Kent, President

GENERAL INSURANCE COMPANY
OF AMERICA
Seattle

September 24, 1928

Mr. W. D. Gillis,
Filer, Idaho.

Dear Sir:

With reference to your registered letter of the 20th instant, we cannot find that we have any policy covering the property mentioned, although we have already paid for a loss to the adjoining property which was damaged at the time of the fire in question.

May we not hear further from you about the policy mentioned in your letter and when and how it was issued and how it covered?

Yours very truly,

GENERAL INSURANCE CO. OF AMERICA
(Sgd.) Geo. H. Belt,
Claim Department.

Geo. H. Belt:ea

PLAINTIFF'S EXHIBIT NO. 15
ADMITTED

W. D. GILLIS
Lawyer
Filer, Idaho.

October 1st, 1928

General Insurance Company
of America
White Building
Seattle, Washington
Mr. Dent Fire Undr

RECEIVED
Mr. Belt Aut. Dv.
OCT. 4, 1928
Aud'ting Reinsurance
Serv. Sup End. Can'd.
Mr. Lamping A. I. A.

Attention of George H. Belt, Claim Department.

Dear Sir:

I have yours of September 24th, in reply to mine of September 20th, 1928, in reference to Policy ID601926 covering the property of C. L. and R. A. Reynolds for $10,000 with mortgage clause payable to Rosa M. Allen, mortgagee.

This policy is dated September 20th, 1924, and was written by your agent, Arthur E. Anderson and covered a building at the corner of Main Street and Park Avenue, Sanborn Fire Map Sheet 5,

Block 29, Street No. 204, Filer, Idaho. It was a two-story brick building.

The policy was written for a term of five years at a rate of $1.63. It is claimed by the Reynolds Brothers, that no notice was given them of the premium for the year September 20th, 1927, to September 20th, 1928. This is denied by your agent, F. C. Graves & Son. It is admitted by the last named agent that no notice of any kind was given to the mortgagee. This insurance was taken over by F. C. Graves & Son, late in the fall of 1924 or '25.

We again renew our request that you either send your adjustor to review our claim or send us blanks upon which we can make proof?

May we have your prompt reply?

Yours very truly

(Sgd.) W. D. Gillis.

WDG:GS.

PLAINTIFF'S EXHIBIT NO. 16
ADMITTED

Directors
O. D. Fisher, Chairman
J. A. Humbird
Frank B. Martin
A. W. Middleton
Henry McCleary
W. L. McCormick
J. P. McGoldrick

Geo. J. Osgood
C. D. Stimson
W. H. Talbot
H. K. Dent, President

GENERAL INSURANCE COMPANY
OF AMERICA

Seattle

October 5, 1928

Re: FW-808 ID-601926
C. L. Reynolds

Mr. W. D. Gillis,
Attorney at Law,
Filer, Idaho

Dear Sir:

We have your letter of October 1st. We have written for additional information with reference to this claim and when such information comes into our hands, shall be glad to advise you definitely as to our attitude.

Yours very truly,

GENERAL INSURANCE COMPANY
OF AMERICA
By (Sgd.) Ralph S. Pierce
Claim Department

Ralph S. Pierce
fl

PLAINTIFF'S EXHIBIT NO. 17
ADMITTED

W. D. GILLIS
Lawyer
Filer, Idaho.

October 11th, 1928.

In re Policy No ID 601926

General Insurance Company of America,
White Building
Seattle, Washington
Gentlemen:

I have your letter of October 5th which says in effect only that you have written for additional information in reference to above policy.

I enclose herewith, on behalf of my client, Rose M. Allen, in whose favor, as mortgagee, Standard Form 371 as an endorsement was attached to Policy ID601926 of C. L. and R. A. Reynolds, whose property was totally destroyed by fire on August 29th, 1928, thereby wiping out the security of the said mortgagee for her mortgage.

I enclose you herewith Proof of Loss on behalf of said Mortgagee, Mrs. Rose M. Allen.

Your Agency here has admitted to a number of people, among them myself and Mrs. Allen that conditions two and three of Form 371, were not complied with. We are therefore complying with the policy contract and supplying you herewith the said Proof of Loss by registered letter, as a basis for

such future action as may be necessary to secure observance of its terms by you.

For your information, we have attached copies of both Form 76 and Form 371, as attached to the original policy.

Yours very truly,

(Sgd.) W. D. Gillis,
Attorney for Rose M. Allen

WDG:GS
Enc.—Proof of Loss.

PLAINTIFF'S EXHIBIT NO. 18
ADMITTED

Directors

O. D. Fisher, Chairman
J. A. Humbird
Frank B. Martin
A. W. Middleton
Henry McCleary
W. L. McCormick
J. P. McGoldrick
Geo. J. Osgood
C. D. Stimson
W. H. Talbot
H. K. Dent, President

Cable Address
"General"

GENERAL INSURANCE COMPANY
OF AMERICA

October 16th, 1928.

Mr. W. D. Gillis,
Filer, Idaho.

ID-601926—REYNOLDS

Dear Sir:

This will acknowledge receipt of your registered letter of the 11th enclosing the Proof, signed by Rose M. Allen, by yourself, in connection with the fire damage of August 29th last, but we are quite at a loss to understand your motive in this matter, in view of the fact that the policy under which this Proof is apparently submitted is in our files, cancelled.

Yours very truly,
GENERAL INSURANCE CO. OF AMERICA
(Sgd.) Geo. H. Belt
Claim Department

Geo. H. Belt: ea

PLAINTIFF'S EXHIBIT NO. 19
ADMITTED

No. of Policy ID601926 Amt of Policy $10,000.00

PROOF OF LOSS
to the
GENERAL INSURANCE COMPANY
OF AMERICA of Seattle, Washington
of Seattle, Washington

BY YOUR POLICY OF INSURANCE NO. ID 601,926 issued at your Agency at Filer, Idaho, said insurance commencing at 12 o'clock noon on the 20th day of September, 1924, and terminating at 12 o'clock noon, on the 20th day of September, 1929, you insured C. L. and R. A. Reynolds (hereinafter called the Insured), against loss and damage by fire to an amount not exceeding Ten Thousand and no/100-----Dollars according to the stipulations and conditions printed in said Policy, the written portion, together with a correct copy of all endorsements, assignments and transfers, being as follows:

STANDARD FORMS BUREAU FORM 76
(Pasted to above Exhibit)

BUILDING FORM (MERCANTILE)

On the following described property, all situate on the northwest corner of Main Street and Park Avenue, Sanborn Fire Map Sheet 5, Block 29, Street No. 204, Filer, Idaho.

1. $10,000.00 on the two story comp. roof brick building and its additions (if any) of like construction communicating and in contact therewith, including foundations, sidewalks, plumbing, electrical wiring and stationary heating and lightning apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only which

occupied for hardware & implement store, and dance hall purposes.

2. $ Nil On.....
3. $ Nil On.....

.....

No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item.

Other insurance permitted.

Loss, if any, subject however to all the terms and conditions of this policy, payable to assured.

"Tenants' Improvements" separately insured for a specific amount under this, or any other policy, are not covered by this policy except for such specific amount, if any, named herein. The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. ID-601926 of the General Insurance Co. Agency at Filer, Idaho. Dated September 20th, 1924.

INSURANCE MAP
Sheet 5
Block 29
No. 204

ARTHUR E. ANDERSON
(Sgd.) Arthur E. Anderson

STANDARD FORMS BUREAU FORM 371
(Pasted to above Exhibit)

MORTGAGE CLAUSE WITH FULL CONTRIBUTION

(To be attached only to policies covering buildings.)

Loss or damage, if any, under this policy, on buildings only, shall be payable to Rose M. Allen, Mortgagee (or Trustee) as interest may appear. Subject to all the terms and conditions hereinafter set forth in this rider, this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

Condition one.—In case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Condition two.—The mortgagee (or t r u s t e e) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased

hazard for the term of the use thereof; otherwise this policy shall be null and void.

Condition three.—This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee), for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall then cease; and this company shall have the right, on like notice to cancel this agreement.

Condition four.—In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

Condition five.—Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest, and

shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of her claim.

Attached to Policy No. ID-601926 of the General Insurance Co.

Issued to C. L. and R. A. Reynolds

Agency at Filer, Idaho Dated Sept. 20th, 1924

ARTHUR E. ANDERSON

Trade Mark Agent

STANDARD

371 (Sgd.) Arthur E. Anderson

July 1917

Loss, if any, payable to Rose M. Allen.

(a) A fire occurred, which commenced about the hour of 2 o'clock A. M. on the 29th day of August A. D. 1928, by which the property described in said Policy was destroyed, and/or damaged, as herein set forth, and which originated from unknown cause.

(b) The interest of the insured and of all others in the property described in said policy was at time of fire:

Interest of Insured, Owners.

Interest of all others than the Insured Rose M. Allen, mortgagee.

At the time of the issuance of said policy and at

all times thereafter the title of insured to the ground on which the building described in said policy stood was as follows: C. L. and R. A. Reynolds.

(c) The cash value of the different articles or properties and the amount of loss thereon, is stated in detail in the inventory furnished, and in schedule attached hereto and made part hereof.

(d) All encumbrances thereon: Rose M. Allen, first mortgage $12,647.00.

(e) All other insurance, whether valid or not, covering any of said articles or properties, is set out in the apportionment table or in the schedules provided for under (f).

(f) A copy of the descriptions and schedules in all other policies, unless similar to this policy, is furnished in the schedule of other insurance herewith and made part hereof.

(g) Any change of title, use, occupation, location, possession or exposures of said property since the issuance of this policy.

Change of title None

Change of use None

Change of occupation None

Change of location None

Change of possession None

Change of exposures None

(h) By whom and for what purpose any building herein described, and the several parts thereof, were occupied at the time of the fire.....

First floor by Implement store by Filer Hardware Co. Estate all other floors by Upper floor dance hall. F. J. Dell, Twin Falls, Ida. and for no other purpose whatever.

The cash value of each specified item thus located and described in the aforesaid policy at the time of the commencement of the fire, the loss and damage by said fire for which claim is hereby made, the total insurance, the total claim for loss under the total insurance and the insurance and claim under said policy are, viz.:

Property Items of Policy, 1st Item.

Total Sound Cash Value, $30,000.
Total Cash Loss and Damage, $30,000.
Total Insurance by Companies, $10,000.
1st Item.
Total Ins.. Under Clause.

Total Claim Under the Total Insurance, $10,-000.00.

Insurance Under This Policy, $10,000.00.

Claim Under This Policy, $10,000.00.

AND THIS INSURED HEREBY CLAIMS from the said INSURANCE COMPANY the sum of TEN THOUSAND and No/100------DOLLARS IN

FULL SATISFACTION OF ALL LIABILITY UNDER SAID Policy for loss and damage by said fire.

The said fire did not originate or continue by any act, design, procurement or wilful neglect on the part of this insured, or on the part of any person having any interest, direct or indirect, in the insured property or in the said policy of insurance, or in consequence of any fraud or evil practice done or permitted to be done by this insured; nothing has been done to violate the conditions of the policy to render it void, or to cause it to be suspended at the time of the fire; no claim is made for loss by theft, or for loss by the neglect of this insured to use all reasonable means to save and preserve the property at the time of and after said fire.

All the articles and property named herein and in the schedules furnished herewith on which claim for loss is made were owned by, or held by, this insured at the time of the commencement of the fire; all of the saved property has been accounted for and exhibited to the representative of the said Insurance Company, and no attempt to deceive the said Company as to the amount of the loss to the property described in said policy of insurance has been made by this insured. Any other information that may be required will be furnished when called for and all bills, invoices, schedules and statements made by this insured and attached to, or referred to, in this proof of loss are incorporated herein and made a part hereof.

The furnishing of this blank to Insured, or making up proofs by adjuster or any agent for above named company, is not to be considered as a waiver of any rights of the company.

Witness my hand at Filer, Idaho, this 11th day of October, 1928.

(Sgd.) Rose M. Allen
By W. D. Gillis,
Her Attorney Insured

Personally appeared W. D. Gillis, Attorney for Rose M. Allen signer of the foregoing statement, who made solemn oath to the truth of the same and that material fact is withheld that the said Company should be advised of, before me, this 11th day of October, 1928.

(Sgd.) Earl S. LaHue

Notary Public in and for the State of Idaho, residing at Filer, Idaho.

(Seal) My commission expires March 17, 1929.

Apportionment of Loss Showing Amount Insured By and Claimed from Each Company.

First Item General Ins. Co. of America, Loss $.

Second Item.....Loss $.

No. of Policy, ID 601926.

Name of Company, General Insurance Co. of America.

Insured, 10,000.

Claimed, $10,000.

Insured, Claimed, None.

STATEMENT OF LOSS

On August 29th, 1928, at about hour of 2 o'clock A. M. a fire occurred causing a total loss of this building, $30,000.00.

DEFENDANT'S EXHIBIT NO. 20
ADMITTED

Oct. 7, 19.....(Year not decipherable)

STANDARD FIRE INSURANCE POLICY
Stock Company (Participating Plan)
No. ID601926

Expires September 20th, 1929.
Property 2 story brick.
Amount $10,000.00.
Assured Reynolds Brothers.

GENERAL
INSURANCE COMPANY
of
AMERICA

Seattle, Washington

(Following written in pencil across fact of Policy:)

Cancelled—Lost to Hardware Dealers Mutual—R. P. Graves—Oct. 4, 1926.

ARTHUR E. ANDERSON
AGENT
FILER, IDAHO

It is important that the written portions of all Policies covering the same property read exactly alike. If they do not they should be made uniform at once.

(Following attached to Exhibit No. 20)

RENEWAL CERTIFICATE

Policy No. ID-601926.

Renewed for one year 9-20-27.

Amount $10,000.00. Rate $1.30. Premium $130.00.

APPROVED ONE YEAR ONLY

2

IDAHO

Jul. 20, 1926

S. & R.

BUREAU

Chief Examiner

General Insurance Company of America.

(Following attached to Exhibit No. 20)

RENEWAL CERTIFICATE

Policy No. ID 601926.

Renewed for one year to 9/20/26.

Amount $10,000.00. Rate $1.63. Premium $130.40.

APPROVED ONE YEAR ONLY

2

IDAHO

Aug. 12, 1925

S. & R.

BUREAU
Chief Examiner
General Insurance Company of America.

DEFENDANT'S EXHIBIT NO. 21
ADMITTED

9-20-26 EFF. Reason 13. Reins Nov. 3. Bookkr Oct. 14 26. Statis Oct. 14 26. Pol. Rcd. 10-7-26. Div. Pd. File Nov. 5 '26.

RE-INSURANCE 3-997 Tab.

No. 1 D601926 From 9/20/24 To 9/20/29.

Assured Reynolds C L & R A

Add Filer Idaho

CANCELLED Filed R. A.

Aug. 15.

WHSE

Loc. NW COR MAIN ST & PARK AVE

D-ND N-U LK LP AGE QUAR 6, CITY 47, CO 42, STA 3, AGT 604, CAUSE 2, DEPT 2.

CLASS NAME 139, Haz PLAN PROT 1/4, CON 7, DIV 25.

COVERS BLDG. R. P. 130.00. AMOUNT 10000. Oct. 14 '26 9.20.26 Tab. RATE Tab 1.30. Prem. 130.00. A. Prem. Aug. 1D28 Tab 130.40 Tab. 130.00. Date Paid 32.10 Sep. 1 20 D 32.

MOTOR NO. REPLACES.

Pay to ROSE M. ALLEN.

AGENT

BROKER R. F. Graves.

CM 20 BK Loss 9/25/28.

DEFENDANT'S EXHIIT NO. 22
ADMITTED

F. C. GRAVES Raymond F. Graves
Real Estate, Loans, Insurance
Filer, Idaho.

September 21, 1926.

Reynolds Bros.
Twin Falls, Idaho.

Gentlemen:

Inclosed find renewal certificate for five year policy covering the garage and dance hall building here. There has been a slight reduction in the premium on this building and the slip has been written under the reduced rate. The premium due on this is $130.00.

Very truly yours,
(Sgd.) Raymond F. Graves

(Following written in ink in lower left hand corner:)

This policy has
been placed wf. (undecipherable)
Hdw. Mutual—
Please cancel
R. A. R.

(Following attached to above Exhibit)

RENEWAL CERTIFICATE

Policy No. ID-601926.
Renewed for one year to 9-20-27.

(DEFENDANT'S EXHIBIT NO. 22)
Amount $10,000.00 Rate $1.30. Premium $130.00
General Insurance Company of America.

DEFENDANT'S EXHIBIT NO. 23
ADMITTED

CHAPTER 48
(S. B. NO. 128)

Be it Enacted by the Legislature of the State of Idaho:

SECTION 1. Any person, persons, copartnership, company, companies, or insurer legally authorized to transact the business of insurance and a resident within this state, or any person who is a resident of this state and not an officer or employee of any insurance company may organize or maintain a rating bureau, for the purpose of inspecting and surveying the various municipalities and fire hazards in this state, and the means and facilities for preventing, confining and extinguishing fires, for the purpose of estimating and promulgating fair and equitable rates for insurance, and to furnish to municipalities, owners of property, insurance companies or agents information as to rates and advice as to measures to be adopted for the reduction of fire hazards on property within this state, and lessening the cost of insurance thereon. Every such rating bureau shall establish and maintain an office in this state. The business of conducting a rating

bureau in this state is public service in character and shall be conducted without profit to any party, except that fair and reasonable compensation shall be paid for all service actually rendered and necessary to the business. Every rating bureau shall, before publishing or furnishing any rates, file in the office of the director of insurance of the department of finance its rating schedules, and shall not deviate therefrom until amended or corrected rating schedules have been filed in the office of the director of insurance. The services of such rating bureaus shall be available, equally and ratably in proportion to the service rendered, to any and all insurance companies, agents and property owners. The office of rating bureaus shall be open during the regular office hours for the information of the citizens of this state.

SEC. 2. Each rating bureau now or hereafter organized and maintained in this state shall keep an accurate and complete record of all work performed by it, in surveying, estimating, and promulgating rates and furnishing information in respect thereto, which record must show all receipts and disbursements and be open during the regular office hours to the inspection and examination of the director of insurance, his deputy or examiner, who may at any time review such rate or rates to determine whether the schedule has been properly applied.

Sec. 3. The director of insurance of the department of finance may address inquiries to any individual, association or bureau which is or has been engaged in making rates or estimates for rates for fire insurance upon property in this state, in relation to his or its organization maintenance or operation or any other matter connected with his or its transactions, and it shall be the duty of every such individual, association or bureau, or some officer thereof, to reply promptly and fully to such inquiries in writing.

Sec. 4. The director of insurance of the department of finance shall have the power to examine any such rating bureau as often as he deems it expedient to do so, and shall do so not less than once every three years. A report thereof shall be filed in his office and statement in regard to each such examination shall be made in the annual report of the department of finance.

Sec. 5. No fire insurance company or other insurer against the risk of fire or lightning, nor any rating bureau shall fix or charge any rate for insurance in this state which discriminates unfairly between risks of essentially the same physical, climatic or other hazards or which discriminates unfairly in the application of like charges and credits between risks of essentially the same physical, climatic or other hazards and having substantially the same degree of protection against fire. Whenever

it is made to appear to the satisfaction of the director of insurance of the department of finance that such discrimination exists, he may, after full hearing either before himself or before any salaried employe of the department whose report be may adopt, order such discrimination removed; and the insurance companies and/or rating bureau or bureaus affected thereby shall comply with such order within thirty days after service of such order upon them; * * * such insurance companies and/or rating bureau or bureaus shall not remove such discrimination by increasing the rates on any risk or class of risks affected by such order unless it is made to appear to the satisfaction of the director of insurance that such increase is justifiably based upon conditions existing at the time of the hearing. The insurance companies and/or rating bureau or bureaus c h a r g e d with discrimination or involved therein shall be given at least five days written notice of hearing, which shall set forth with reasonable certainty the discrimination charged. If the director of insurance finds that the discrimination exists, and orders its removal he shall find and state in his order whether an increase in any rate involved is justified. Any insurance company and/or rating bureau or bureaus affected by such order may appeal therefrom to the district court of the State of Idaho for Ada County within thirty days after service of the order, by serving upon the director of insurance of the department of finance,

and filing with the clerk of said court, a notice of appeal together with a copy of the order appealed from, a copy of the notice of hearing and an undertaking in the sum of $500.00 with one or more qualified sureties, conditioned to pay all costs that may be awarded against the appellant upon the appeal * * * The appeal shall be heard and tried in the manner provided by law for the trial of suits in equity. The notice of hearing shall be deemed a complaint and shall be deemed denied and no other pleading shall be required. If the court sustains the charge of discrimination, it shall determine also by its order or decree whether such discrimination may be removed by increasing any rate involved. Either the director of insurance or any insurance company or rating bureau affected by the order or decree of the court may appeal therefrom to the supreme court of the State of Idaho in the same manner that appeals may be taken from other final judgments.

Sec. 6. Every rating bureau operating under the provisions of this act shall appoint a person with the title of "Chief Examiner," who shall be experienced in insurance matters, but such person shall not in any way be engaged in making rates for the bureau and shall be held responsible for the examination of all applications and daily reports submitted to such bureau and shall report to the director of insurance of the department of finance any and all cases in which companies or agents discrim-

inate on risks of essentially the same hazard or deviate from the schedules on file in the department, and any and all violations of this act, but he shall not make or keep any copy or copies of such applications or daily reports or record thereof except to indorse his approval thereon if correct, or attach such memoranda or entries as may be necessary to show what, if any, errors exist; keeping copies thereof, for the purpose of checking errors and releasing memoranda thereof when corrected. Upon the failure of such person to report promptly any violation of this law he shall be liable to a penalty of ten dollars for each violation.

Sec. 7. All applications for fire insurance and daily reports of policies issued by every fire insurance company holding membership in a rating bureau on risks in this state shall be submitted to the chief examiner of such rating bureau, for the purpose of examination to ascertain if there are any errors in the forms of policy or rate of premium charges therefor, who shall indorse his approval on such application or daily report if correct; withholding his approval if incorrect as to the form used or rate charged, such as to constitute a discrimination in rate, advising the company and the agent submitting same, showing wherein the error exists and if correction thereof is not made within a reasonable time he shall report the same with the name of the company and the agent to the director of insurance of the department of finance.

Sec. 8. Every fire insurance company or other insurer authorized to effect insurance against the risk of damage by fire or lightning in this state shall, before being permitted to write such insurance in this state, file with director of insurance of the department of finance a schedule of rates, unless such company or other insurer has given notice to the department of its acceptance of the schedule of rates filed by a rating bureau of which such company or other insurer is a member, and any company or other insurer filing such schedule of rates, or giving notice to the director of insurance of the acceptance of the schedule filed by a rating bureau, shall not deviate therefrom until corrected or amended schedules shall have been filed in the office of the director of insurance of the department of finance, and every company or other insurer not belonging to a rating bureau and having filed its individual schedule as herein required, shall keep a complete record of all applications and daily reports received by it, showing the same to have been written in conformity with its rating schedule filed with the director of insurance and promptly notify its agents or other representatives of any errors in the applications or the daily reports written or submitted by them, and shall report to the director of insurance any failure upon the part of such agents or other representatives to make such corrections in the same manner and with the same penalties for violation as is required of the chief examiner

of a rating bureau, which record of its business shall at all times be open to inspection by the director of insurance, his deputy or examiner. No such insurer shall be a member of more than one rating bureau for the purpose of rating the same class or classes of risks, nor file, publish or use the rates or rating schedules of any rating bureau organized or maintained under the provisions of this act, unless such insurer is a member thereof. Every insurer that has given notice to the director of insurance of the department of finance of its acceptance of the schedule of rates filed by a rating bureau of which it is a member shall, thirty days in advance of any variation by it from the bureau rate, filed with the said director or insurance and rating bureau, the variation from the bureau rate which shall be uniform throughout the territorial classification and every such insurer shall be permitted to make uniform variations from the bureau rate.

Sec. 9. Except as contained in the policy and the usual agreement for other insurance, no such insurance company or insurer or rating bureau shall make any contract or agreement with any person insured or to be insured with regard to the time any rate shall remain in effect, or that the whole or any part of any insurance shall be written or placed with any particular company, agent or any group of companies, insurers or agents.

Sec. 10. A rating bureau shall admit to membership any authorized insurer applying therefor. Ex-

penses of the bureau shall be shared by each member in proportion to the gross premiums received by it during the previous year on business rated by such bureau, deducting premiums and dividends returned to policy holders, to which may be added a reasonable annual fee.

Sec. 11. Every rating bureau or insurer engaged in making rates or estimates for rates for fire insurance on property in this state shall inspect every risk specifically rated by it, making a written survey of such risk, which shall be filed as a permanent record in the office of such rating bureau or insurer, and a copy of such survey shall be furnished to the owner of the property surveyed upon request. Such insurance companies and/or rating bureau or bureaus shall also provide such means as may be approved by the director of insurance of the department of finance, whereby any person or persons affected by such rate or rates may be heard before the proper executive of such companies and/or rating bureau or bureaus on an application for a change in such rate or rates.

Sec. 12. Every insurance company doing business in this state shall file in the office of director of insurance of the department of finance its short rate table for cancellation of policies and shall not deviate therefrom until an amendment shall have been filed with the director of insurance, nor shall any insurance company file a schedule of rates of any rating bureau less a certain percentage of the

rates estimated and promulgated by said bureau when making insurance.

Sec. 13. Every corporation, association, bureau or person failing to comply with the requirements of this act or knowingly and wilfully violating any of its provisions, shall be deemed guilty of a misdemeanor, and upon conviction be fined not to exceed one hundred dollars for each offense, and any license or certificate of authority granted by the director of insurance of the department of finance to the offender may be suspended or revoked.

Sec. 14. The provisions of this act shall not apply to any county mutual insurance company; Provided, That such county mutual company upon filing with any such bureau its application for membership and agreeing to become subject to the provisions of this act shall be entitled to membership in such bureau and thereupon become subject to the provisions of this act.

Approved February 23, 1923.

CERTIFICATE

This is to certify that the foregoing bill of exceptions tendered by the defendant is true and correct; that it contains all of the evidence in narrative form introduced at the trial, together with all of the exhibits offered and admitted in evidence; also the memorandum opinion filed, the judgment, stipulation of counsel dated and filed July 11, 1929, ex-

tending time to August 1, 1929, within which counsel for defendant may serve a draft of the proposed bill of exceptions, order dated and entered July 11, 1929, extending time to August 1, 1929, within which counsel for defendant may serve a draft of proposed bill of exceptions, motion of defendant filed July 11, 1929, requesting special findings, objection of plaintiff to defendant's motion requesting special findings, order dated and entered July 26, 1929, denying defendant's request for special findings, order dated and entered July 26, 1929, extending time to August 12, 1929, within which counsel for defendant may serve a draft of proposed bill of exceptions, request in writing for a declaration of law in favor of defendant and against the plaintiff, dated July 29, 1929, filed July 30, 1929, plaintiff's objections in writing to granting defendant's request for a declaration of law in its favor filed July 30, 1929, order of the court dated and entered July 30, 1929, denying defendant's request for a declaration of law in its favor, and allowing defendant an exception to the ruling of the court, and fixing time up to August 12, 1929, within which to serve on attorneys for the plaintiff a draft of the proposed bill of exceptions, a nunc pro tunc order correcting judgment dated and entered July 30, 1929, defendant's petition for new trial served upon counsel for the plaintiff July 31, 1929, filed August 1, 1929, order dated and entered August 8, 1929, extending time to August 15, 1929,

within which counsel for defendant may serve a draft of proposed bill of exceptions herein, order denying defendant's petition for new trial dated and entered September 6, 1929, defendant's exception to the ruling of the court denying defendant's petition for a new trial, together with the proposed amendments filed on behalf of the plaintiff to the bill of exceptions tendered by defendant, comprising thirty-five paragraphs, all of which are by the court denied and overruled, with the exception of paragraph 2, which is allowed, and exceptions are allowed in favor of plaintiff on the court's ruling upon each and all of the proposed amendments to the bill of exceptions tendered by defendant except proposed amendment No. 2, upon the grounds as stated in the respective proposed amendments.

And I hereby approve, settle and allow the same as a full, true and correct bill of exceptions herein.

Dated: Boise, Idaho, September 6th, 1929.

CHARLES C. CAVANAH
District Judge

Filed Sept. 6, 1929.

(Title of Court and Cause)
No. 1393

PETITION FOR APPEAL

The above-named defendant, General Insurance Company of America, a corporation, feeling aggrieved by the judgment made and entered on July

2nd, 1929, in favor of the plaintiff, Rosa M. Allen, and against the defendant, General Insurance Company of America, a corporation, for the sum of Ten Thousand ($10,000.) Dollars principal, together with interest and costs, does hereby appeal from said judgment and from the order of the court dated and signed July 30th, 1929, denying the defendant's request for a declaration of law; "that under the pleadings, contract of insurance and evidence, plaintiff is not entitled to recover, and the decision and judgment of the court is in favor of the defendant," and from the order of the court dated and signed on September 6th, 1929, denying defendant's petition for a new trial, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith; and your petitioner prays that this appeal may be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and orders were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner, General Insurance Company of America, desiring to supersede the execution of said judgment directing the payment of Ten Thousand ($10,000.) Dollars, with interest and costs, to the plaintiff, Rosa M. Allen, by the defendant, General Insurance Company of America, as set forth in said judgment, tenders bond in such

amount as the court may require for such purpose and prays, that with the allowance of the appeal, a supersedeas may be issued.

Dated this 23rd day of September, 1929.

JAMES R. BOTHWELL
W. ORR CHAPMAN
Attorneys for Petitioner
Residence, Twin Falls, Idaho.

Service of the within and foregoing Petition for Appeal is hereby acknowledged this 24th day of September, 1929, by receipt of copy thereof.

W. D. GILLIS
Residing at Boise, Idaho.
JOHN W. GRAHAM
Residing at Twin Falls, Idaho.
Attorneys for Plaintiff.

Filed Sept. 24, 1929.

(Title of Court and Cause)

No. 1393

ASSIGNMENT OF ERRORS

And now comes the defendant, General Insurance Company of America, a corporation, and having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered in the above-entitled

cause on July 2nd, 1929, and from the order of the court dated and signed July 30th, 1929, denying defendant's request for a declaration of law "that under the pleadings, contract of insurance, and evidence, plaintiff is not entitled to recover, and the decision and judgment of the court is in favor of the defendant," and from the order of the court dated and signed on September 6th, 1929, denying defendant's petition for a new trial, and says that said judgment and orders, and each of them, made and filed by the court in said cause, are erroneous and unjust to this defendant and particularly in this:

1. Because the court erred in finding and adjudging generally for the plaintiff and against the defendant.

2. Because the said judgment is contrary to law.

3. Because the said judgment is contrary to the evidence.

4. The court erred in permitting the witness R. A. Reynolds to answer the following question over defendant's objection:

> "Q. At the time of the execution of the note and mortgage was there any agreement between you and Mrs. Allen in regard to carrying insurance on the property?
>
> A. Yes.

MR. BOTHWELL: I object to that. It is now shown that there was a mortgage, an instrument in writing, and that would be the best evidence.

THE COURT: The mortgage probably contained the condition to the insurance.

MR. GRAHAM: I do not think it contained the requirement as to the insurance, but at the time the note and mortgage were executed and contemporaneously with it, he agreed to give additional security in the way of insurance.

THE COURT: He may answer.

A. I had an agreement with Mrs. Allen that I would carry $10,000, insurance at all times on the building at least.

Q. This policy was taken out in accordance with that agreement?

A. With the mortgage clause attached to it, yes."

5. The court erred in sustaining objections of plaintiff to questions asked the witness and plaintiff, Rosa M. Allen, on cross-examination, as follows:

"Q. You were talking with Mr. Reynolds about collecting interest on the notes?

A. Yes.

Q. Did you say anything to him about insurance at that time?

cause on July 2nd, 1929, and from the order of the court dated and signed July 30th, 1929, denying defendant's request for a declaration of law "that under the pleadings, contract of insurance, and evidence, plaintiff is not entitled to recover, and the decision and judgment of the court is in favor of the defendant," and from the order of the court dated and signed on September 6th, 1929, denying defendant's petition for a new trial, and says that said judgment and orders, and each of them, made and filed by the court in said cause, are erroneous and unjust to this defendant and particularly in this:

1. Because the court erred in finding and adjudging generally for the plaintiff and against the defendant.

2. Because the said judgment is contrary to law.

3. Because the said judgment is contrary to the evidence.

4. The court erred in permitting the witness R. A. Reynolds to answer the following question over defendant's objection:

> "Q. At the time of the execution of the note and mortgage was there any agreement between you and Mrs. Allen in regard to carrying insurance on the property?
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MR. BOTHWELL: I object to that. It is now shown that there was a mortgage, an instrument in writing, and that would be the best evidence.

THE COURT: The mortgage probably contained the condition to the insurance.

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THE COURT: He may answer.

A. I had an agreement with Mrs. Allen that I would carry $10,000, insurance at all times on the building at least.

Q. This policy was taken out in accordance with that agreement?

A. With the mortgage clause attached to it, yes."

5. The court erred in sustaining objections of plaintiff to questions asked the witness and plaintiff, Rosa M. Allen, on cross-examination, as follows:

"Q. You were talking with Mr. Reynolds about collecting interest on the notes?

A. Yes.

Q. Did you say anything to him about insurance at that time?

MR. GRAHAM: She has already answered that.

THE COURT: She said she didn't recall. Sustained.

Q. Well, do I understand by that that you have talked to him about it at that time?

A. No, sir, I did not.

Q. You looked in your box in 1927 to see whether this policy was there?

MR. GRAHAM: I object to that as immaterial and not proper cross-examination.

THE COURT: Sustained.

Q. Why didn't you inquire from Mr. Reynolds about the policy at that time?

MR. GRAHAM: I object to that as immaterial and not proper cross-examination.

THE COURT: What is the purpose why she didn't do this? I cannot see the idea unless it is going to lead up to something else. I cannot see where it is competent now as to why she did not do this or do that. She has testified as to what she actually did. I can see how it might be competent. I don't know what you may be leading up to. It might be material under certain circumstances to ask that question. I think I will let her answer the question.

THE COURT: He is asking why you didn't inquire from Mr. Reynolds about this policy in 1927. Any reason why you didn't do it, if you had any?

A. I never thought of asking him.

THE COURT: That other question I think I will allow you to answer that.

MR. BOTHWELL: Will you read the question, Mr. Reporter? (Question read by Reporter)

Q. Why didn't you look in your box in 1927 to see whether this policy was there?

A. I just never thought of looking, that was all.

Q. You were leaving that matter, the question of insurance, to Mr. Reynolds, as I understand it?

A. Yes."

6. The court erred in sustaining plaintiff's objection to the following question asked of the witness R. A. Reynolds on cross-examination on rebuttal:

"MR. BOTHWELL: Q. Did you have any hardware in this building when it burned?

A. Yes, we had some hardware but not a great deal.

Q. What hardware did you have?

MR. GRAHAM: I object to that as not proper examination upon rebuttal.

THE COURT: Sustained."

7. Because the judgment is not supported by the pleadings.

8. Because under the pleadings, contract of insurance and evidence, the defendant was entitled to

a declaration of law as follows: "The court declares the law to be that under the pleadings, contract of insurance and evidence in this case the plaintiff is not entitled to recover against the defendant, General Insurance Company of America, and the decision and judgment of the court is in favor of the defendant."

9. Because the evidence shows without contradiction that plaintiff appointed R. A. Reynolds as her agent, with full power to insure the property in question, to select the insurer and to surrender the policy in question for cancellation to the agent of the defendant, and the uncontradicted evidence shows that R. A. Reynolds, the agent of plaintiff, surrendered the policy in question to defendant's agent for cancellation and notified defendant's agent in writing that the insurance upon the property had been placed with the Hardware Mutual Insurance Company.

10. Because the evidence shows without contradiction that plaintiff knew, or could have known, by the exercise of ordinary care that her agent, R. A. Reynolds, had not placed the policy in question in her safety deposit box in the First National Bank of Filer, Idaho, and that plaintiff allowed the policy to remain out of the safety deposit box and under the control of her agent, R. A. Reynolds, and thereby placed it within the control of her said agent to surrender the policy for cancellation.

11. Because it is shown by the evidence, without contradiction, that plaintiff had no dealings whatever with defendant except through R. A. Reynolds, and plaintiff having received the benefits of the insurance for the years 1924 and 1925 through the contract of insurance secured by the said R. A. Reynolds, is now estopped from denying that Reynolds was her agent, and was acting within the scope of his authority when he surrendered the policy for cancellation.

12. Because the uncontradicted evidence shows that the immediate cause of cancellation of the policy was the failure of Reynolds to place the policy in the safety deposit box in the First National Bank of Filer, but on the contrary retained the policy in his possession and thereafter surrendered the policy to defendant's agent, with a statement in writing that the policy had been replaced with the Hardware Mutual Insurance Company, and the uncontradicted evidence further shows that plaintiff opened the safety deposit box and knew, or by the use of her natural senses could have known that the policy was not, in fact, in the safety deposit box, and plaintiff knew at that time that the mortgagors were in default upon the mortgage and consequently plaintiff is estopped from contending that the policy was not surrendered for cancellation with her knowledge and consent.

13. Because it appears from the evidence, with-

out contradiction, that the policy was cancelled because Reynolds, agent of the plaintiff, failed to place the policy with the First National Bank of Filer, and thereafter notified defendant's agent in writing that the policy had been replaced with the Hardware Mutual Insurance Company, and that plaintiff, by the use of her natural senses, could have known that the policy was not, in fact, in her safety deposit box in the First National Bank of Filer, and plaintiff is therefore estopped from contending that the policy was not canceled with her knowledge and consent.

14. Because the uncontradicted evidence shows that the act of R. A. Reynolds, in notifying the agent of the defendant, that the policy had been replaced with the Hardware Mutual Insurance Company, was not "an act of neglect of the mortgagor," whereby the policy was invalidated within the meaning of the mortgagee clause attached to the policy, but was an act in furtherance of the agreement between plaintiff and R. A. Reynolds, that Reynolds would keep the building insured, select the insurer, pay the premiums, replace the insurance in a company to the mutual advantage of the plaintiff and mortgagors and place the policy in the First National Bank at Filer, Idaho.

15. Because it is shown by the uncontradicted evidence that prior to the loss, plaintiff ratified the act of R. A. Reynolds in permitting the policy to be cancelled.

16. Because it is shown by the uncontradicted evidence that one of the mortgagors, R. A. Reynolds, was the agent of plaintiff, and that plaintiff's said agent, R. A. Reynolds, notified the defendant's agent in writing that the policy had been replaced with the Hardware Mutual Insurance Company, and plaintiff is chargeable with the knowledge and acts of her agent in the premises.

17. Because it is shown by the uncontradicted evidence that the term of insurance under the policy in question was from 12 o'clock Noon, on September 20th, 1924, to 12 o'clock Noon, September 20, 1925, and from 12 o'clock Noon, September 20, 1925, to 12 o'clock Noon, September 20, 1926, and that said policy of insurance expired at Noon on September 20, 1926, and was not renewed for the year September 20, 1926, to September 20, 1927, and was not in effect on the date of the loss by fire of the building in question.

18. The court erred in overruling defendant's demurrer to plaintiff's complaint.

19. The court erred in ordering judgment entered in favor of plaintiff and against defendant without containing a provision to the effect, "that upon payment of said judgment to the mortgagee the defendant shall, to the extent of such payment, be subrogated to all the rights of the mortgagee, and that the defendant shall receive a full assignment, and transfer of the mortgage and all other securities held by plaintiff" as provided in condition

5 of the mortgage clause attached to the insurance policy in question.

WHEREFORE, the defendant prays that the judgment of the District Court may be reversed.

JAMES R. BOTHWELL
W. ORR CHAPMAN
Attorneys for Defendant,
Residing at Twin Falls, Idaho.

Service of the within and foregoing Assignment of Errors is hereby acknowledged this 24th day of September, 1929, by receipt of copy thereof.

W. D. GILLIS
Residing at Twin Falls, Idaho.
JOHN W. GRAHAM
Residing at Boise, Idaho,
Attorneys for Plaintiff.

Filed Sept. 24, 1929.

(Title of Court and Cause)

No. 1393

ORDER ALLOWING APPEAL

This cause coming on now to be heard this 24th day of September, 1929, upon the petition of defendant for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and the court being fully advised, it is ORDERED that defend-

ant's petition for appeal be granted, and that the appeal be allowed as prayed for, the same to operate as a supersedeas upon the petitioner, General Insurance Company of America, filing a bond in the sum of $12,000.00, with good and sufficient sureties, conditioned as required by law, the same to serve as a supersedeas bond and a bond for costs and damages on appeal.

Dated this 24th day of September, 1929.

CHARLES C. CAVANAH
Judge

Filed Sept. 24, 1929.

(Title of Court and Cause)

BOND ON APPEAL FOR SUPERSEDEAS AND COSTS

KNOW ALL MEN BY THESE PRESENTS, That we, GENERAL INSURANCE COMPANY OF AMERICA, as principal, and AETNA CASUALTY AND SURETY COMPANY, as surety, are held and firmly bound unto the plaintiff in the above-entiled action in the just and full sum of $12,000.00, for the payment of which well and truly to be made, we bind ourselves, and each of us, and our, and each of our heirs, executors, administrators, successors and assign, firmly by these presents.

Sealed with our seals and dated this 25th day of September, 1929.

The condition of this obligation is such, that,

WHEREAS, the General Insurance Company of America, defendant, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered in this cause, on July 2nd, 1929, in favor of the plaintiff and against the defendant, and from the orders named in defendant's petition for an appeal:

NOW, THEREFORE, If the above named defendant and appellant, shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, otherwise the same shall be, and remain, in full force and virtue.

IN WITNESS WHEREOF, the said principal has caused its name to be hereunto subscribed by its duly authorized attorneys of record, and the said surety has caused its name to be hereunto subscribed by its duly authorized officers, and its corporate seal affixed the day and year first above written.

GENERAL INSURANCE COMPANY,
OF AMERICA,

By JAMES R. BOTHWELL
W. ORR CHAPMAN
Its Attorneys.

AETNA CASUALTY AND SURETY
(Seal) COMPANY

Surety

By J. Peuover
Resident Vice-President

Attest:
M. E. Gealy
Resident Assistant Secretary

The foregoing Bond is hereby approved to operate as a bond for costs and as a supersedeas.

Dated this 25th day of September, A. D. 1929.

CHARLES C. CAVANAH
Judge

Filed Sept. 25, 1929.

(Title of Court and Cause)

CITATION

TO: ROSA M. ALLEN, PLAINTIFF:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the state of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein the General

Insurance Company of America is appellant and you are respondent, to show cause, if any there be, why the judgment and orders in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

WITNESS The Honorable Charles C. Cavanah, United States District Judge for the District of Idaho, this 24th day of September, A. D. 1929, and of the Independence of the United States the One Hundred and Fifty-third Year.

CHARLES C. CAVANAH

(Seal) *Judge*

Attest:

W. D. McREYNOLDS, Clerk.

Service of the foregoing Citation and receipt of copy thereof admitted by the undersigned on the 24th day of September, A. D. 1929.

W. D. GILLIS
JOHN W. GRAHAM
Attorneys for Plaintiff,
Residence: Boise and Twin Falls, Idaho.

Filed Sept. 24, 1929.

(Title of Court and Cause)

No. 1393

PRAECIPE FOR TRANSCRIPT ON APPEAL

TO: W. D. McREYNOLDS, CLERK OF THE ABOVE-ENTITLED COURT:

You will please prepare the record on appeal of the defendant, General Insurance Company of America, taken in the above-entitled cause from the judgment made and entered on July 2nd, 1929, and the orders dated and signed July 30, 1929, and September 6th, 1929, such record to consist of the following:

1. Complaint.
2. Demurrer to Complaint.
3. Order overruling demurrer to the complaint.
4. Stipulation in writing waiving jury.
5. Answer as amended.
6. Memorandum decision of the court filed July 1st, 1929.
7. Judgment.
8. Order amending judgment Nunc Protunc upon the Court's own motion.
9. Bill of Exceptions settled by the court under date of September 6, 1929.
10. All papers filed in connection with this appeal, namely, Petition for Appeal,
    Assignment of Errors,
    Order Allowing Appeal,
    Bond on Appeal, supersedeas and for costs,
    Citation.

In preparing the above record you will please omit the title of all pleadings except the first paper named above, but in lieu thereof insert the words "Title of Court and Cause," to be followed by the name of the pleadings or instrument.

You will also please omit the verification of all pleadings, but in lieu thereof insert wherever the pleading is verified the words "duly verified."

Dated this 23rd day of September, 1929.

JAMES R. BOTHWELL
W. ORR CHAPMAN
Attorneys for Defendant,
Residing at Twin Falls, Idaho.

Service of the above Praecipe and receipt of a copy thereof is acknowledged this 24th day of September, 1929.

W. D. GILLIS
Residing at Boise, Idaho.
JOHN W. GRAHAM
Residing at Twin Falls, Idaho.
Attorneys for Plaintiff.

Filed Sept. 24, 1929.

(Title of Court and Cause)

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do

hereby certify the foregoing transcript of pages numbered from one to 233 inclusive, to be full, true, and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as by the praecipe herein directed.

I further certify that the cost of the record herein amounts to the sum of $285.10, and the same has been paid by the appellants.

Witness my hand and the seal of said Court this 9th day of November, 1929.

W. D. McREYNOLDS, Clerk

(Seal)

No. 5982

In The United States
Circuit Court of Appeals
For the Ninth Circuit

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

ROSE M. ALLEN,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

CHARLES C. CAVANAH, *District Judge*

Appellant's Opening Brief

JAMES R. BOTHWELL,
W. ORR CHAPMAN,
Twin Falls, Idaho,

RALPH S. PIERCE,
1102 White Building,
Seattle, Washington.
Attorneys for Appellant.

GATEWAY PRINTING COMPANY, SEATTLE

FILED
JAN 20 1953
PAUL P. O'BRIEN,
CLERK

INDEX

TABLE OF CASES

No. 5982

In The United States
Circuit Court of Appeals
For the Ninth Circuit

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

ROSE M. ALLEN,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

CHARLES C. CAVANAH, *District Judge*

STATEMENT OF THE CASE

This is an action to recover on an insurance policy which was issued by the Appellant Company on September 20, 1924, to C. L. and R. A. Reynolds and insured buildings upon property situated in the town of Filer, Idaho, (Tr. 14). To it was attached a form entitled, "Mortgage Clause with Full Contribution," (Tr. 29), by the provisions of which the loss or damage under the policy was made payable to Rose M. Allen as Mortgagee, (Tr. 29). The building insured was destroyed by fire on August 29, 1928. The amount of

the policy was $10,000 and the record discloses that at the time of the fire, C. L. and R. A. Reynolds were indebted to Rose M. Allen in an amount in excess of that sum.

Proof of loss was filed on behalf of the Mortgagee alone, (Tr. 199) and she is the sole plaintiff. A history of the issuance of the policy is essential to an understanding of the points raised by the various Assignments of Error.

Prior to 1919, the plaintiff's husband was engaged in the hardware business in Filer, Idaho, together with the Reynolds brothers. He died in that year and in the settlement of the estate, Mrs. Allen sold her interests in the Filer Hardware Company to the Reynolds brothers, and accepted in payment therefor promissory notes signed by Richard A. Reynolds and Charles L. Reynolds and their respective wives. The notes matured at different dates (Plaintiff's Exhibit 6, 7, 8 and 9, Tr. 172-176). The total amount of the notes given was $12,629.73. As security for said notes a mortgage was executed by the Reynolds brothers for the total sum of the notes; was signed by the same parties as were the notes; the mortgage which covers the property described in the insurance policy, was executed June 20, 1919, and is set forth in full in Transcript at page 177. This mortgage does not contain the ordinary provision requiring the mortgagor to keep the property insured, a fact which was admitted by Counsel in open court. (Tr. 219).

Any agreement as to insurance was made by an independent contract and is not evidenced by any written instrument. From 1919 until 1924, the insurance was carried in a company or companies other than the Appellant, and was on a yearly basis, (Tr. 62). The policies were placed in a safe deposit box belonging to Mrs. Allen and in the First National Bank at Filer, Idaho. The selection of the companies and all details with reference to the insurance devolved upon Mr. Reynolds.

In September, 1924, the policy in controversy was written. All negotiations with reference to this policy were conducted by Mr. Reynolds through the Appellant's local agent, Arthur E. Anderson. So far as the record discloses, Mrs. Allen personally did not at any time communicate with the Company or its agent. The first annual premium due September 20, 1925, was paid by the Reynolds brothers (Exhibit 5, Tr. 171) and a renewal certificate was issued August 12, 1925, (Defendant's Exhibit 20, Tr. 201), which by its terms renewed the policy for one year or up to September 20, 1926.

There is a dispute in the testimony as to some of the conversation in connection with the 1926 renewal. Mr. Anderson, the agent who originally secured the policy, had sold his business to Mr. R. F. Graves in May, 1925, and the initial premium was paid to him (Tr. 171). Mr. Graves, Senior, one of the members of the new firm, testified that the business was desirable and that he was anxious to hold it, (Tr. 108). Mr.

Graves, Junior, another member of the firm, testified that he visited Mr. Reynolds at his office to collect the annual premium and to secure a renewal of the policy, (Tr. 89), sometime prior to the expiration date, (Tr. 89). That he again talked to R. A. Reynolds on October 4, 1926, (Tr. 89). That at the time of the first conversation, Mr. Reynolds indicated his intention to transfer the insurance to the Hardware Dealers Mutual. That at the second conversation, Mr. Reynolds surrendered to him the original policy and that Mr. Graves thereupon endorsed on the face of the policy, "Cancelled—Lost to Hardware Dealers Mutual—R. P. Graves—Oct. 4, 1926." That he, in accordance with the usual custom, tore off the face of the policy and mailed it to the Company's Home Office at Seattle. This policy face was produced by the Company from its records and Mr. Becker, the Assistant Secretary, testified that it was the customary practice to mail in only the face in order to save postage, (Tr. 77). Mr. Becker also identified (Defendant's Exhibit 21, Tr. 202) the original record of the Company as to this policy and pointed out that Reason 13, that appeared on that record, indicated that the business had been lost to another company, (Tr. 97).

Mr. Reynolds denied having the policy in his possession and that he had surrendered it to Mr. Graves, but the Defendant produced a bill for the renewal of the policy, mailed to Mr. Reynolds, dated September 21, 1926, (Defendant's Exhibit 22, Tr. 203), upon which he noted: "This policy placed WF—Hdw. Mutual, please cancel, R. A. R." This notation sub-

stantiates the testimony of Mr. Graves and establishes without doubt that the failure to renew the policy was due entirely to Mr. Reynolds.

Mrs. Allen, according to her own testimony, left Idaho in April, 1924, or some five months prior to the issuance of the policy, (Tr. 67). She returned to Filer in June, 1927, remaining there three weeks. The purpose of her visit was to collect delinquent interest on the notes from the Reynolds brothers, (Tr. 70). She went to her safe deposit box but did not observe as to whether or not the insurance policy was in the box, (Tr. 71). Proof of loss was verified by Mrs. Allen on October 11, 1928, (Tr. 199), and mailed by her attorney, Mr. Gillis, to the Home Office of the Company, (Tr. 89). The proof of loss was made in behalf of Mrs. Allen alone.

The complaint was filed December 12, 1928, Rose M. Allen being the only plaintiff. The Defendant demurred to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action, (Tr. 32). This demurrer was overruled by the Court, February 11, 1929, (Tr. 33).

This brief statement of the facts, as revealed by the record, emphasizes the following points that bear directly upon the various Assignments of Error:

I.

The mortgage did not require the mortgagor to carry insurance for the benefit of the mortgagee, and the relationship between Mrs. Allen, the plaintiff, and

the Reynolds brothers, the mortgagors, with reference to insurance was created by an independent and separate contract.

II.

Mrs. Allen left Idaho before the issuance of the insurance policy; had no dealings with the defendant company personally and any representations made to her as to the terms and conditions or as to the term of the insurance policy, were made by Mr. Reynolds.

III.

The insurance policy was not terminated by any affirmative act on part of the Defendant or its agent, but solely by the failure of the insured to pay the annual premium and by his surrender of the policy.

IV.

Mrs. Allen returned to Idaho to collect delinquent interest on the notes secured by the mortgage; actually went to the safe deposit box where, according to her testimony, the policy was supposed to be, and made no search for the policy or any inquiries concerning it. This was in 1927 and prior to the fire.

Assignment of Errors

And now comes the defendant, General Insurance Company of America, a corporation, and having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered in the above-entitled cause on July 2nd, 1929, and from the order of the court dated and

signed July 30, 1929, denying defendant's request for a declaration of law "that under the pleadings, contract of insurance, and evidence, plaintiff is not entitled to recover, and the decision and judgment of the court is in favor of the defendant," and from the order of the court dated and signed on September 6, 1929, denying defendant's petition for a new trial, and says that said judgment and orders, and each of them, made and filed by the court in said cause, are erroneous and unjust to this defendant and particularly in this:

1. Because the court erred in finding and adjudging generally for the plaintiff and against the defendant.

2. Because the said judgment is contrary to law.

3. Because the said judgment is contrary to the evidence.

4. The court erred in permitting the witness R. A. Reynolds to answer the following question over defendant's objection:

> "Q. At the time of the execution of the note and mortgage was there any agreement between you and Mrs. Allen in regard to carrying insurance on the property?
>
> A. Yes.
>
> MR. BOTHWELL: I object to that. It is now shown that there was a mortgage, an instrument in writing, and that would be the best evidence.
>
> THE COURT: The mortgage probably contained the condition to the insurance.
>
> MR. GRAHAM: I do not think it contained the

requirement as to the insurance, but at the time the note and mortgage were executed and contemporaneously with it, he agreed to give additional security in the way of insurance.

THE COURT: He may answer.

A. I had an agreement with Mrs. Allen that I would carry $10,000 insurance at all times on the building at least.

Q. This policy was taken out in accordance with that agreement?

A. With the mortgage clause attached to it, yes."

5. The court erred in sustaining objections of plaintiff to questions asked the witness and plaintiff, Rose M. Allen, on cross-examination, as follows:

"Q. You were talking with Mr. Reynolds about collecting interest on the notes?

A. Yes.

Q. Did you say anything to him about insurance at that time?

MR. GRAHAM: She has already answered that.

THE COURT: She said she didn't recall. Sustained.

Q. Well, do I understand by that that you have talked to him about it at that time?

A. No, sir, I did not.

Q. You looked in your box in 1927 to see whether this policy was there?

MR. GRAHAM: I object to that as immaterial and not proper cross-examination.

THE COURT: Sustained.

Q. Why didn't you inquire from Mr. Reynolds about the policy at that time?

MR. GRAHAM: I object to that as immaterial and not proper cross-examination.

THE COURT: What is the purpose why she didn't do this? I cannot see the idea unless it is going to lead up to something else. I cannot see where it is competent now as to why she did not do this or do that. She has testified as to what she actually did. I can see how it might be competent. I don't know what you may be leading up to. It might be material under certain circumstances to ask that question. I think I will let her answer the question.

THE COURT: He is asking why you didn't inquire from Mr. Reynolds about this policy in 1927. Any reason why you didn't do it, if you had any?

A. I never thought of asking him.

THE COURT: That other question I think I will allow you to answer that.

MR. BOTHWELL: Will you read the question Mr. Reporter? (Question read by reporter).

Q. Why didn't you look in your box in 1927 to see whether this policy was there?

A. I just never thought of looking, that was all.

Q. You were leaving that matter, the question of insurance to Mr. Reynolds, as I understand it.

A. Yes."

6. The court erred in sustaining plaintiff's objection to the following question asked of the witness R. A. Reynolds on cross-examination on rebuttal.

"Mr. Bothwell: Q. Did you have any hardware in this building when it burned?

A. Yes, we had some hardware but not a great deal.

Q. What hardware did you have?

Mr. Graham: I object to that as not proper examination upon rebuttal.

The Court: Sustained."

7. Because the judgment is not supported by the pleadings.

8. Because under the pleadings, contract of insurance and evidence, the defendant was entitled to a declaration of law as follows: "The court declares the law to be that under the pleadings, contract of insurance and evidence in this case the plaintiff is not entitled to recover against the defendant, General Insurance Company of America, and the decision and judgment of the court is in favor of the defendant."

9. Because the evidence shows without contradiction that plaintiff appointed R. A. Reynolds as her agent, with full power to insure the property in question, to select the insurer and to surrender the policy in question for cancellation to the agent of the defendant, and the uncontradicted evidence shows that R. A. Reynolds, the agent of plaintiff, surrendered the policy in question to the defendant's agent for cancellation and notified defendant's agent in writing that the insurance upon the property had been placed with the Hardware Mutual Insurance Company.

10. Because the evidence shows without contradiction that plaintiff knew, or could have known, by exercise of ordinary care that her agent, R. A. Reynolds, had not placed the policy in question in her safety deposit box in the First National Bank of Filer, Idaho, and that plaintiff allowed the policy to remain out of the safety deposit box and under the control of her agent, R. A. Reynolds, and thereby placed it within the control of her said agent to surrender the policy for cancellation.

11. Because it is shown by the evidence, without contradiction, that plaintiff had no dealings whatever with defendant except through R. A. Reynolds, and plaintiff having received the benefits of the insurance for the years 1924 and 1925 through the contract of insurance secured by the said R. A. Reynolds, is now estopped from denying that Reynolds was her agent, and was acting within the scope of his authority when he surrendered the policy for cancellation.

12. Because the uncontradicted evidence shows that the immediate cause of cancellation of the policy was the failure of Reynolds to place the policy in the safety deposit box in the First National Bank of Filer, but on the contrary retained the policy in his possession and thereafter surrendered the policy to defendant's agent, with a statement in writing that the policy had been replaced with the Hardware Mutual Insurance Company, and the uncontradicted evidence further shows that plaintiff opened the safety deposit box and knew, or by the use of her natural senses could have

known that the policy was not, in fact, in the safety deposit box, and paintiff knew at that time that the mortgagors were in default upon the mortgage and consequently plaintiff is estopped from contending that the policy was not surrendered for cancellation with her knowledge and consent.

13. Because it appears from the evidence, without contradiction, that the policy was cancelled because Reynolds, agent of the plaintiff, failed to place the policy with the First National Bank of Filer, and thereafter notified defendant's agent in writing that the policy had been replaced with the Hardware Mutual Insurance Company, and that plaintiff, by the use of her natural senses, could have known that the policy was not, in fact, in her safety deposit box in the First National Bank of Filer, and plaintiff is therefore estopped from contending that the policy was not canceled with her knowledge and consent.

14. Because the uncontradicted evidence shows that the act of R. A. Reynolds, in notifying the agent of the defendant, that the policy had been replaced with the Hardware Mutual Insurance Company, was not "an act of neglect of the mortgagor," whereby the policy was invalidated within the meaning of the mortgagee clause attached to the policy, but was an act in furtherance of the agreement between plaintiff and R. A. Reynolds, that Reynolds would keep the building insured, select the insurer, pay the premiums, replace the insurance in a company to the mutual advantage of the plaintiff and mortgagors and place

the policy in the First National Bank at Filer, Idaho.

15. Because it is shown by the uncontradicted evidence that prior to the loss, plaintiff ratified the act of R. A. Reynolds in permitting the policy to be cancelled.

16. Because it is shown by the uncontradicted evidence that one of the mortgagors, R. A. Reynolds, was the agent of plaintiff, and that plaintiff's said agent, R. A. Reynolds, notified the defendant's agent in writing that the policy had been replaced with the Hardware Mutual Insurance Company, and plaintiff is chargeable with the knowledge and acts of her agent in the premises.

17. Because it is shown by the uncontradicted evidence that the term of insurance under the policy in question was from 12 o'clock noon, on September 20, 1924, to 12 o'clock noon, September 20, 1925, and from 12 o'clock noon, September 20, 1925, to 12 o'clock noon, September 20, 1926, and that said policy of insurance expired at noon on September 20, 1926, and was not renewed for the year September 20, 1926 to September 20, 1927, and was not in effect on the date of the loss by fire of the building in question.

18. The court erred in overruling defendant's demurrer to plaintiff's complaint.

19. The court erred in ordering judgment entered in favor of plaintiff and against defendant without containing a provision to the effect, "that upon payment of said judgment to the mortgagee the de-

fendant shall, to the extent of such payment, be subrogated to all the rights of the mortgagee, and that the defendant shall receive a full assignment, and transfer of the mortgage and all other securities held by plaintiff" as provided in condition 5 of the mortgage clause attached to the insurance policy in question.

ARGUMENT

We shall discuss Assignment of Error No. XVIII first, said assignment being as follows:

> "The court erred in overruling defendant's demurrer to plaintiff's complaint."

The complaint alleged ownership of the property in R. A. Reynolds and C. L. Reynolds the execution of the insurance policy September 20, 1924, the existence of the mortgage, and the attachment to the policy of the mortgage clause. The failure of the company to give notice of cancellation to the mortgagee, although there is no allegation that the policy had been cancelled as to any party, the making of the proof of loss for the full sum of $10,000.

A copy of the policy was annexed to the complaint, and by reference, made a part thereof, (Tr. 9).

The first clause of the policy, (Tr. 14) recites the payment of the first premium, and with that exception, there is no allegation in the complaint that the premiums provided for in the policy had been paid. The policy provides, (Tr. 14):

> "Amount, $10,000.00; Rate, $1.63; Premium, $130.40. In consideration of the stipulations herein

named and of One Hundred Thirty and 40/100 Dollars First Annual Premium, and by the payment of the then current annual premium to this company, at or before 12 o'clock noon, or before the 20th day of September in every year, renewing from year to year within said term, does insure C. L. and R. A. Reynolds for the term of five years from the 20th day of September, 1924, at noon, to the 20th day of September, 1929, at noon, against all direct loss or damage by fire except as hereinafter provided."

Paragraph IV of the Complaint, (Tr. 10), fixes the date of the fire as August 29, 1928. The complaint then on its face shows that the premiums due in September, 1926 and 1927, were delinquent and unpaid. The above provision of the policy clearly makes the payment of the then current premium to the company at or before 12 o'clock noon, on or before September 20, or every year a condition precedent to the continuation of the policy in effect. By the payment of the first annual premium, the policy was made effective for one year, and it was only on the condition that the subsequent yearly payment be made, that the company agreed to insure the property for the full term of five years. The policy as written was for one year with the option to renew, but with no agreement on part of the insured to renew. The company could not have, by suit or otherwise, collected any additional premium from C. L. Reynolds or R. A. Reynolds. It was their privilege to continue the insurance by the payment of the annual premium or to permit it to expire.

In the case of *Millar v. Western Union Life Insurance Company,* 106 Wash. 491, 180 Pac. 489, a life insurance policy was involved. It was what is known as a "20-year payment plan" and provided for an annual premium under the following provision:

> "The advanced payment in cash to the company of an annual premium of $280.85 for the term insurance for one year, ending on the 7th day of October, 1916, and the payment of an equal amount upon said date and yearly thereafter until premiums for 20 full years in all shall have been paid."

The policy contained no specific provision for forfeiture in case of failure of the insured to pay any installment. The first premium was paid. The insured defaulted in the second premium and died within a few days after its due date. Action was brought to recover under the policy on the theory that in the absence of the forfeiture clause, the non-payment of the premium did not affect the forfeiture. The Court, speaking through Justice Mount, said at page 497:

> "We think it is plain from the provisions of the policy hereinbefore quoted, that this contract is one of assurance for a year with the privilege of renewal, but without obligation to renew from year to year thereafter by payment of stated annual premiums. The assured assumed no obligation upon accepting the contract of insurance. He did not promise to carry the insurance for any stated period. He paid the first premium before receiving the policy. If he thereafter chose to pay the premiums each year in advance, the respondent was obligated to carry his insurance and give his beneficiaries the benefits that the policy afforded,

but the assured was free to withdraw or to abandon the contract whenever he chose and the respondent could not compel him to continue the contract relations longer than he chose or to pay any premium if he did not wish to do so. There is here, no entire contract of insurance for life, because the insured did not agree to carry the policy for life or for any other term beyond the first year. He merely purchased the option to take and carry it if, and as long, as he chose to do so. Under the terms of the policy, it was a term policy for the first year and automatically terminated at that time unless the insured sought to keep it alive by paying the second premium."

The court quotes with approval from *Boke v. New York Life Insurance Company*, 192 Mo. App. 383, 181 S. W. 1047:

> "An argument is made that because the policy is stipulated to be incontestible and there is no expressed provision of forfeiture therein, such policy continued in force whether premiums were paid or not and without regard to the non-forfeiture laws in this state, and that defendant's only right is to deduct the unpaid loan and premiums from the amount of the policy. The case was not prosecuted or tried on any such theory, and besides, where as here the payment of the amount of the policy is conditioned on the payment of premiums when due, then such payments become conditions precedent and the stipulation of incontestibility does not apply to failure to pay premiums."

Brady v. Northwestern Insurance Company, 11 Mich. 443, is one of the oldest cases we have found on the subject. It has been frequently cited in the later cases. The policy in that case provided:

> "This insurance may be continued for such fur-

> ther time as shall be agreed upon. The premium thereon being paid and endorsed on this policy and a receipt given for the same."

The policy was issued in 1856 and was renewed until 1861. After the issuance of the policy, ordinances had been passed forbidding the repair of wooden buildings in certain districts. The obligation of the policy was to repair. This the company offered to do. The plaintiff contended that in view of the ordinance, the company could not limit its liability to repair but should pay the damage suffered. The court said:

> "The question now presented is whether the liability of the defendant is under the promise of 1856 or that of 1861. In other words, was the undertaking of 1856 made a continuous undertaking to be construed by the laws and ordinances as they existed in 1856 solely, or by the renewal were the parties bound by the laws and ordinances existing at the time of the renewal? We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration and was optional with both parties. At the expiration of the year over which the original policy extended, the obligation of the insurer was ended and it was only by the concurrence of the will of both parties that the obligation could be continued. This concurrence is manifested by the payment of a consideration by the one party and a renewal promise by the other, and an obligation revived or continued under such circumstances is an original obligation. It must be asked for by the one and may be assumed or refused by the other, and the policy which is in evidence is therefore continued by the positive act of both parties."

A similar provision was under consideration in *Maryland Casualty Company v. First National Bank*,

246 Federal 899. In that case a bond had been issued as of January 10, 1914, and by the payment of renewal premiums, continued to January 10, 1915. In an opinion written by Judge Walker of the Circuit Court, it was said:

> "That contract is what is known in the insurance business as a term policy, under which the insurance contracted for covers only such losses occurring before the expiration of its stated term. Further action of the parties, having the effect of creating a new contract, was required to make the defendant liable for any loss or losses occurring after January 10, 1915."

In *Proctor Coal Company v. United States Fidelity and Casualty Company*, 124 Federal 427, the following is found:

> "I think the contention of counsel for the defendant that these renewals are separate and distinct contracts is sound. It is urged that certain language in the bond shows that it was intended to be a continuous contract covering the period of the bond or any subsequent renewals. The language referred to is this: 'Make good and reimburse to the employer, all and any pecuniary loss sustained by the employer, etc., occurring during the continuance of the bond or any renewal thereof.' I am unable to agree with the argument of plaintiff as to the proper construction to be placed on this language * * *. I do not think the language is sufficient to justify the conclusion that this was a continuous contract of suretyship running through the whole period covered by the orginal bond and the two renewals. The correct view seems to be that each renewal is a separate and distinct contract and such, I think, is the effect of the authorities on the subject."

In *DeJennette v. Fidelity Casualty Company,* 98 Ky. 558, 33 S. W. 829, we find:

> "A renewal of the policy constitutes a separate and distinct contract for the period of time covered by such renewal."

Insurance Company v. Walsh, 54 Ill. 164, 5 AM-REC 115, holds:

> "A renewal of a policy is in effect a new contract of assurance and unless otherwise expressed, on the same terms and conditions as were contained in the original policy."

Under these decisions, the failure of the plaintiff to allege the payment of the annual premium was fatal. The policy of insurance expired on September 20, 1925, unless renewed and continued by the payment of the annual premium.

In a decision by this court in the case of *Kentucky Vermillion M. & M. Company v. Norwich Union,* 146 Federal 701, Judge Hawley, speaking for the court said:

> "Under the terms of the policy, if the property remained idle for 'more than thirty days at one time', the policy ceased and terminated. It became void and of no binding force and effect unless the insured gave notice to the company and obtained permission to leave it idle for a longer time by having such time endorsed on the policy. Terms of warranty are conditions precedent to the right of recovery and must always, if not waived or forfeited, be complied with by the assured."

Here, the payment of the renewal premium was a condition precedent to the right of recovery and the

plaintiff's failure to allege such payment in the complaint made it vulnerable to demurrer on the ground of insufficiency.

The plaintiff in her complaint sought to avoid the penalty for non-payment of the premium by the provisions of the mortgagee clause. The sections of that clause pertinent to the present discussion are:

> 1. "Subject to all the terms and conditions hereinafter set forth in this rider, this insurance as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, * * *.
>
> 2. In case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee shall, on demand, pay the same."

In an endeavor to avail herself of these provisions, the plaintiff alleged in her complaint and in Paragraph VIII that she had received no notice of cancellation; that she at all times stood ready to pay on demand any premium, but that no such demand was made, (Tr. 12).

The first guarantee that the interests of the mortgagee shall not be invalidated by any act or neglect of the mortgagor, has no bearing on the situation presented in this case. The mortgagor was not guilty under the allegations of the complaint, of any act or neglect which invalidated the policy in any particular. So far as the complaint is concerned, the Reynolds brothers complied with every provision of the insurance contract. Paragraph I of the terms and conditions

of the policy, (Tr. 17), declares that the policy shall be void in certain contingencies. The mortgagor was not alleged to have committed any act therein prohibited and in fact, there is no allegation anywhere in the complaint that the policy was invalid. Neither is any neglect charged to the mortgagors. The policy imposes certain duties upon them and there is no allegation that they failed in any particular to fulfill such duties.

The act or neglect of the mortgagor can apply only to the doing of an act prohibited by the policy or the failure to perform a duty imposed by its terms for these are the only grounds upon which the policy may be invalidated. It will be urged that the mortgagor neglected to renew the policy by not paying the annual premium, but this is not alleged in the complaint and we have pointed out that the policy did not obligate the mortgagors to renew. That was optional with them. If they desired to allow the policy to lapse or to place the business elsewhere, such was their privilege and by so doing they did not violate any provision of the insurance contract. There may have been an obligation on part of the mortgagor to keep the property insured. It was created by some other agreement to which the appellant was not a party and which was separate and distinct from the insurance contract. If the Reynolds brothers failed in this obligation, the mortgagee's remedy is against them, not against the appellant. They were not required under the policy to pay anything but the initial premium. In failing to renew the contract, they did

not neglect to do anything required of them by the policy.

Reliance will be placed also upon condition No. 1 of the mortgage clause which provides: Condition One—

> "In case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same."

There was no premium due. There was no sum that the mortgagor was obligated to pay. Premium due must mean a premium that can be collected by civil action. In the ordinary policy, the consideration is the payment of a definite premium. There is a distinct liability to pay under such circumstances, and the mortgagee would clearly be entitled to a demand of payment before cancellation, but here there is no agreement to pay any subsequent premium. There is a privilege of renewal and if this is not taken advantage of, the policy simply expires and terminates.

There is a wide difference between the expiration of a policy and its cancellation by an affirmative act on part of the company. We know of no rule of law or equity that imposes upon an insurance company the duty of informing a policyholder of the date of expiration of his policy. There is no provision in the policy requiring it and the policyholder is charged with the duty of protecting himself in this regard.

In *Thompson v. Insurance Company*, 104 U. S. 252, 26 L. Ed. 765, the policy was for life in consideration of the annual premium payable on or before a fixed date.

The assured being unable to pay the premium one year, gave his note, which was not paid on maturity. It was held that failure to pay the note was fatal to recovery. The court said:

> "The law, however, has not changed, and if a forfeiture is provided for in case of non-payment at the date, the court cannot grant relief against it. The insurer may waive it or may by his conduct lose his right to enforce it, but that is all."

The court further said, p. 258:

> "The assured knew, was bound to know, when his premium became due."

and at page 260, we find:

> "But the fatal objection to the entire case set up by the plaintiff is that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed if payment had been tendered within the limited period of such indulgence, but this was never done. The plaintiff has, therefore, failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstances relied upon had been sufficiently favorable to lay the ground for it. A valid excuse for not paying promptly upon a particular day is a different thing from an excuse for not paying at all."

Condition III of the Mortgage Clause is:

> "This company reserves the right to cancel at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee for ten days after notice to the mortgagee of such cancellation and shall then cease and this Company shall have the right, on like notice, to cancel this agreement."

Counsel's theory, as evidenced by the complaint, is that regardless of whether the premium was paid or not by the mortgagor, the policy was still valid because of the failure of the company to notify the mortgagee of cancellation as required by this condition. It was alleged in Paragraph VIII of the complaint that no notice of cancellation was mailed, delivered or served upon this plaintiff; that plaintiff had no knowledge of any kind of cancellation, if any, made as to the said R. A. Reynolds and C. A. Reynolds, and plaintiff alleges no cancellation of any kind was made on said R. A. Reynolds and C. A. Reynolds.

Condition III requires that if the company exercises the right to cancel, the policy shall continue in force for the mortgagee for ten days after notice to the mortgagee. The condition refers only to affirmative action by the company. In view of the allegation of the complaint that no cancellation was attempted as to either the mortgagor or the mortgagee, this condition was entirely inapplicable so far as the demurrer was concerned.

We submit, under the foregoing authorities, that the complaint did not state facts sufficient to constitute a cause of action and that the demurrer should have been sustained.

Assignments of Error I, II and III

These Assignments are as follows:

1. The court erred in finding and adjudging generally for the plaintiff and against the defendant.

2. The said judgment is contrary to law.

3. The said judgment is contrary to the evidence.

These Assignments may be discussed together. All that has been said in support of the demurrer is applicable to them but is strengthened by the facts disclosed by the evidence.

The mortgage did not require the mortgagor to carry insurance for the benefit of the mortgagee, and the relationship between Mrs. Allen, the plaintiff and the Reynolds brothers, the mortgagors, with reference to insurance was created by an independent and separate contract.

Mrs. Allen left Idaho before the issuance of the insurance policy; had no dealings with the defendant company personally and any representations made to her as to the terms and conditions or as to the term of the insurance policy, were made by Mr. Reynolds.

It was alleged, and some evidence was offered to the effect that the parties understood the policy to be for five years instead of one. Mrs. Allen stated that Mr. Reynolds told her that he was taking out a five-year policy (Tr. 73). She did not talk to the agent of the Appellant company. She never saw the policy, (Tr. 66). Such information as she had was obtained from persons having no connection directly or indirectly with the appellant. Surely, the Appellant cannot be bound by statements made to her by persons having neither actual or implied authority to speak for it.

Mr. Reynolds is positive in his testimony, (Tr. 119), that he told Mrs. Allen that premiums were to be paid

annually. Mr. Reynolds paid two annual premiums (Defendant's Exhibits 4 and 5, Tr. 170), and was mailed a renewal certificate, (Defendant's Exhibits 20 and 21, Page 201). These certificates were issued by the Stamping Bureau of the State of Idaho under the authority of the Statute (Tr. 208, 209, Sections 6 and 7) and carried in large type the provision "Approved for One Year Only". The rate on the original policy was $1.63. On the first renewal $1.63, on the second renewal $1.30. How could a man accustomed to business, be misled into a belief that a policy was for five years when he knew the premium was payable annually; when his receipts specified that it was a renewal certificate and announced to bold type that it was approved for one year only and where the rate was changed from year to year. If, in fact, Mr. Reynolds did not know, he should have known as a reasonably intelligent man that the failure to renew the policy would terminate it, and what Mr. Reynolds knew, Mrs. Allen should have known. He was her sole source of information. He alone made all representations as to the policy.

The trial court in his memorandum decisions stressed that the policy used the expression "Does insure for a period of five years", (Tr. 48, but this agreement is specifically made dependant upon the consideration of the renewal of the policy by the payment of an annual premium. If the annual premium was not paid, the consideration failed and the policy expired. The appellant company was powerless to compel Reynolds or Mrs. Allen to continue the policy in force or to compel

the payment of the premium if the policy remained in force. After the rendition of the judgment herein (Tr. 49), and on July 22, 1928, the trial court on July 31, entered a corrected judgment granting the appellant credit for annual premiums of 1926 and 1927. This action was entirely inconsistent with his theory as expressed in the decision. If this was a five-year policy and continued to expiration in 1929 without further action by the assured, then the company was entitled to the premium for the entire period. If it was a contract for one year only, and expired in September of each year unless renewed, the company was entitled only to the annual premium due. The court in its supplemental judgment, (Tr. 50), recognized our theory of the case and gave credit accordingly.

The court, after a review of the evidence, was of the opinion that the policy had lapsed because of the neglect of the mortgagor to pay the annual premium and held that the mortgage clause relieved the mortgagee from the consequences of this neglect, but as we have already indicated, the neglect against which the mortgagee is protected is such that invalidates the policy. You can not invalidate something that is not in existence. The mortgage clause clearly contemplates an existing valid policy which would be effective but for some act or neglect of the mortgagor, not a policy that has by its terms expired.

For example, the policy provides, (Tr. 19), that it shall be void if the building becomes vacant or unoccupied and so remains for ten days. Many mortgagees do

not reside in the district where the property is situated, are not in a position to see that this and similar provisions of the policy are complied with. For this reason, insurance companies have protected mortgagees against invalidating of the policy as to its interests by providing that the policy shall not be invalid as to such mortgagee because of the violation of its terms in such particulars by a mortgagor. The mortgagor has right of possession. In most instances, is in actual possession, and is therefore, in a position to see that the terms and conditions of the policy are complied with, but the mortgagee and mortgagor are in identically the same position so far as knowledge of the expiration date is concerned.

Suppose this policy, with the mortgage clause attached, had been issued for three years and required the payment of the premium upon the issuance of the policy. Suppose the mortgagor was under agreement to keep the property insured but had failed to renew the policy at the expiration date. Would the company be liable because of this act or neglect on part of the mortgagor? Why should a different rule pertain when the policy is for one year with the privilege of renewal by the payment of an annual premium? The only act or neglect on the part of Mr. Reynolds was the failure to renew the policy at the expiration date. Mrs. Allen is just as responsible for this neglect as was Mr. Reynolds. As was well said in *Hoskin v. Hurwitz,* 208 N. Y. S. 40:

> "Defendant did not obligate himself to advise plaintiff of the expiration date of the policy, nor

> was it the defendant's duty, either under the allegations of the complaint or as a matter of law, to advise plaintiff that the policy expired at any particular time." Fries v. Breslin, 176 Fed. 76, 99 C. C. A. 38, S. C. 215, U. S. 609, 30 S. Ct. 410, 54 Led. 347. The terms of the policy were always within the knowledge of the plaintiff and if he failed to remember that the policy expired at a certain time before the fire, it was his own negligence and not the defendant's which prevented plaintiff from renewing the policy."

Mr. Reynolds had agreed to keep the property insured (Tr. 68). The insurance company was not a party to this agreement; had no knowledge of it; it was not incorporated in the mortgage, so the Appellant is chargeable with neither actual or constructive notice of the agreement. It was Mrs. Allen's duty to protect her own interests and see that Mr. Reynolds performed his agreement. The mortgage was executed in 1919. From that date until 1926 he did keep the property insured. A period of seven years. She further required that the policy be deposited for safe keeping in her own safe deposit box. This was done until 1924, at least according to her own testimony (Tr. 69). In 1927 (Tr. 70) the Reynolds were behind in the interest on the notes and she was forced to travel from California to Idaho to straighten matters out. She went to the safe deposit box; she knew that Reynolds was in financial difficulty and was not keeping other agreements; was in a position to learn whether he was keeping the agreements as to the insurance. At that time the policy had expired and had already been sur-

rendered. It was because of her neglect that the building was without insurance when destroyed in August, 1928. Had she not returned to Idaho in 1927, she might be entitled to more consideration, but she was on the ground with notice that Reynolds was delinquent in his legal duties and could have, by the slightest effort, ascertained the truth with reference to her insurance. Why blame the insurance company? We had tried to retain the business; had endeavored to persuade Reynolds to renew the policy, but were informed over his own signature that he had placed the insurance elsewhere. We had no reason to doubt his statements and were justified in assuming that everybody's interests had been protected by the new policy.

The district court held that we should have notified Mrs. Allen under the mortgage clause of the cancellation. There was no cancellation. There was a surrender of the policy on an expiration date by the only person with whom the company had dealt in connection with the policy. We did not terminate the policy by cancellation, we fought to retain the business. The local agent wanted it. He frankly admitted that the premium was attractive to him. He lost the business to a competitor and so informed the company and the records kept in the usual course of business show the policy as lost business, not as a cancellation. (Defendant's Exhibit 21). The local agent was so anxious to retain the business that he actually enclosed in his lettel to Mr. Reynolds, the renewal certificate and called attention to the fact that there was a slight reduction

in the premium, (Exhibit 22, Tr. 203). The letter was returned with the notation "This policy has been placed with the Hardware Mutual", the note being initialed by R. A. Reynolds. Where, then, in the record is there any support to the contention that the company cancelled the policy. If Mr. Reynolds had simply neglected the matter, or if he had informed the agent that he intended to let all insurance lapse, perhaps the duty of the company would have been different, but he specifically stated that the policy had been placed elsewhere and the agent had every reason to believe that all interests were fully protected by the new policy.

The trial court held that we should have demanded the premium from Mrs. Allen under the provisions of the mortgage clause, but that provision has no application here. Where the policy is issued in consideration of the agreement to pay a specified sum for the insurance for a definite period the provision would apply, but here no premium was due. Neither Mr. Reynolds nor Mrs. Allen was obligated to renew the policy or to pay the premium necessary to continue the policy in force during the year beginning September 20, 1926. This policy had expired at noon of that day. The duty of the company was no greater than is imposed upon it at the expiration date of any other policy. There was no legal duty to renew upon which a demand for the premium could be predicated. The mortgage clause requires a demand only where the mortgagor neglects to pay. We sought to obtain a new contract covering the year 1927

and failed. Until the minds of the parties had met and agreed that the policy should be renewed, no premium was due. The policy simply expired and terminated with no duty imposed upon us to continue it in force after its expiration date.

Assignment IX.

This assignment is in the following language:

> "Because the evidence shows without contradiction that plaintiff appointed R. A. Reynolds as her agent, with full power to insure the property in question, to select the insurer and to surrender the policy in question for cancellatiion to the agent of the defendant, and the uncontradicted evidence shows that R. A. Reynolds, the agent of the plaintiff, surrendered the policy in question to defendant's agent for cancellation and notified defendant's agent in writing that the insurance upon the property had been placed with the Hardware Mutual Insurance Company."

If it should be held that the policy had not expired, and that the company would be liable to the mortgagee because of the provisions of the mortgage clause, then in the alternative we contend that the liability of the company ceased because of the surrender of the policy and the termination thereof by consent, through the acts of C. A. Reynolds, acting as agent for Mrs. Allen, within the scope of his apparent authority.

There is some dispute in the record as how the policy got into the hands of the local agent, but it is clear that the policy was surrendered to the company in October, 1926, nearly two years before the fire occured. It is the respondent's theory, supported by testimony

of two vitally interested witnesses, Mr. Reynolds and Mrs. Allen, that the policy was issued and left in the possession of Mr. Anderson who was then the local agent with instructions to deliver the policy to the First National Bank of Filer for deposit in the safe deposit box of Mrs. Allen. That Mr. Anderson failed to follow these instructions; kept the policy in his possession and delivered it to Mr. Graves when he sold the business. That Mr. Graves retained it until October, 1926, at which time, without the knowledge of either Mrs. Allen or Mr. Reynolds, he marked the policy cancelled and mailed it to the Home Office.

The Appellant's theory, likewise supported by testimony, is that the policy, upon execution, was delivered to Mr. Reynolds; retained by him until October, 1926, at which time he surrendered the policy to Mr. Graves because he had placed the business with the Hardware Mutual. What the real facts are is immaterial.

Either Mrs. Allen or Mr. Reynolds was entitled to the policy under arrangement between themselves. By custom the policy is placed in the hands of the mortgagee. If neither obtained the policy, they were guilty of extreme neglect for which they alone are responsible. If it was the arrangement that the policy should be placed in Mrs. Allen's custody in her safe deposit box, she was guilty of extreme negligence in not discovering its absence when she was in Idaho in 1927 and prior to the fire, especially in view of the fact that she made the trip because of Mr. Reynolds delinquencies with reference to the loan protected by the policy.

If Mr. Reynolds was the agent of Mrs. Allen, and acting within the scope of his apparent authority, agreed to the surrender of the policy, it makes little if any difference whether the policy was in his possession or that of Mr. Graves. The important question is; his authority to surrender or to authorize the surrender of the policy? There is no doubt of what Mr. Reynolds intended to do. He was mailed a renewal certificate for the policy. The policy was indentified clearly as covering the garage and roof garden at Filer, and Mr. Reynolds noted thereon that the business had been placed in the Hardware Mutual. But one conclusion is possible and that is that Mr. Reynolds intended that the policy should terminate, and if he was acting within his apparent authority, Mr. Graves was justified in sending the policy in if it were in his possession or in going to Twin Falls and getting the policy from Mr. Reynolds as he testified he did.

The whole matter hinges upon the agency of Mr. Reynolds and its scope. The mortgage did not obligate either Mr. R. A. Reynolds or his brother to carry insurance (Plaintiff's Exhibit 1, Tr. 153). His agency, if any, was created by an independent agreement. Mrs. Allen testified that the agreement was that "Mr. Reynolds was to carry insurance for my security," (Tr. 65). "At all times there was to be $10,000 insurance policy carried, with mortgagee clause attached, in my interest." (Tr. 68). That she was leaving the question of insurance to Mr. Reynolds. (Tr. 86). This statement being qualified upon re-direct examination that she did not authorize Mr. Reynolds to cancel any

policy, (Tr. 87). Mr. Reynolds' testimony is; (Tr. 60). "I had an agreement with Mrs. Allen that I would carry $10,000 insurance at all times upon the building at least."

The appellant is not concerned with whether Mr. Reynolds failed in his duty to Mrs. Allen. She may have a cause of action against him for his neglect in not keeping the property insured. The vital question is: Was he acting within the scope of his apparent authority in allowing the policy to terminate, or in surrendering it and replacing the insurance elsewhere? The policy provides:

> "This policy shall be cancelled at any time at the request of the insured." (Tr. 20).

Mrs. Allen could exercise this right personally or through an agent, subject to the limitations that he must act within the scope of his apparent authority. It is also apparent that a policy may be cancelled by mutual consent and that such consent may be given by an agent if acting within the scope of his apparent authority. This phase of the litigation is governed by the principles of ostensible agency or authority or power:

> "Ostensible authority to act as an agent may be conferred if the party to be charged as principal, affirmatively or intentionally through the lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." Peterson v. Kuhi, 193 N. W. 756, 110 Neb. 372:

> "Ostensible powers of an agent are his real powers as to persons dealing with him without

knowledge of limitations on his apparent authority." Rugg v. Johnson, 140 N. E. 816, 246 Mass, 229:

> "The essential inquiry is not what authority the defendant intended to confer, but what authority a reasonable person in such position could naturally suppose he had conferred." Federal Insurance Co. v. Sydeman, 136A, 137 (N. H. 1927).

The agreement between Mrs. Allen and Mr. Reynolds with reference to insurance was made in 1919. From that time Mr. Reynolds had entire control as to the placing of insurance. He selected the companies, at least four policies were secured before 1924. These were placed in Mrs. Allen's safe deposit box, (Tr. 62). He selected the appellant company at the solicitation of the appellant's local agent, (Tr. 63). His control over insurance was more apparent because it is common knowledge that insurance is generally controlled by the mortgagee. He made the initial payment; paid the first annual premium; when the renewal was solicited by Mr. Graves, he again asserted his control and in writing notified the agent that he had placed the insurance elsewhere. He was not in the insurance business, either as an agent or a broker. Apparently he had absolute control, as far as the insurance was concerned, and had exercised that control continuously for seven years. The agent had persuaded him to switch the insurance from another company to the appellant and had no reason to doubt his authority to transfer the insurance from the appellant to the Hardware Mutual.

When Mrs. Allen was pressed to answer why she had not checked her insurance in 1927, she was forced to commit herself.

> "Q. Why didn't you look in your box in 1927 to see whether this policy was there?
>
> A. I just never thought of looking that was all.
>
> Q. You were leaving that matter, the question of insurance, to Mr. Reynolds, as I understand it?
>
> A. Yes." (Tr. 86).

True, on further examination, directed by leading questions of her counsel, she stated that she did not authorize Mr. Reynolds to cancel insurance. (Tr. 87). This was a purely self-serving declaration. She had given Mr. Reynolds ostensible and apparent control over insurance matters for seven years and Mrs. Allen could not avoid the consequences of his act as her agent by a mere denial of his authority.

It must be conceded that mere authority to place insurance does not along carry with it the authority to cancel. It is needless to review the innumberable Authorities on this point. In most of them the agent soliciting the business endeavored to cancel, in practically all of them but one policy for one term was involved. In a few we find a course of action extending over a period of years or a relationship which the courts have held constituted an authority to cancel as well as to place. In 26 C. J. 137, Page 160, we find the following rule:

> "Where, however, a property owner constitutes

> the agent of fire insurance companies or a broker to keep the property insured and empowers him to select the insurer, the agent has power to cancel the policies without notice to the insured and to substitute therefore a policy of another company and that is especially true where the agent or broker of the assured is not the agent of the insuring company. An agent with authority to keep property insured, has the right to cancel one and substitute another policy."

Hollywood Lumber Co. v. Dubuque, etc. West Virginia, 1927, 92 S. E. 858: *Kooistria v. Rockford Insurance Company*, 81 (North Western) N. W. 569: *Arnfield v. Guardian Insurance Co.*, 34 A. 580: *May v. Hartford Insurance Company*, 297 F. 999.

> "A general agent with power to insure property and to keep it insured, may accept notice of cancellation and procure substituted insurance or renewal of insurance in another company." *Ferrai v. Western Insurance Company*, 30 Cal. App. 493, 159 Pac. 609. In the case of *Kooistria vs. Rockford Insurance Co.*, 81 N. W. 568." 122 Mich. 627, it is said:

> "She (the plaintiff) left the policy in the hands of her agent and thus placed it in his power to mislead the defendant who acted in good faith in cancelling the policy. If Mr. Lathrop failed to notify the plaintiff, this is no fault of the defendant. By leaving the policy with her agent, she placed it in his power to mislead the defendant. If both parties are innocent, it was her act which has misled and she must be the sufferer."

If Mr. Reynolds was not the agent of Mrs. Allen, whom did he represent? He had no connection with the appellant company? He placed insurance with us.

What reason did we have to question his authority to withdraw it? He notified the appellant that he had placed the insurance elsewhere; was acting within the scope of his apparent authority as the agent for Mrs. Allen and the appellant was fully justified in assuming that the policy had been permitted to terminate and expire with the full knowledge and consent of Mrs. Allen. She allowed the matter to drift for two years without investigation. Neglected her insurance until a loss occurred. If she has suffered a loss it is due to her own carelessness in the selection of her agent and in failing where opportunity was presented to discover that her agent had violated his agreement to keep her property insured.

Assignment of Error VIII

Because, under the pleadings, contract of insurance and evidence, the defendant was entitled to a declaration of law as follows:

> "The court declares the law to be under the pleadings, the contract of insurance and the evidence in this case, the plaintiff is not entitled to recover against the defendant, General Insurance Company of America, and the decision and judgment of the court is in favor of the defendant."

Judgment was entered in the cause on the 2nd day of July, 1929, (Tr. 136). On July 11, 1929, the defendant moved that special findings be made by the court and filed an affidavit of James R. Bothwell, one of the attorneys in the case, in support of said motion to the effect that it had been his intention to request special

findings in the brief which had been submitted to the court, but that said request had inadvertantly been omitted from the brief, (Tr. 138). Counsel immediately filed objection to this motion for special findings and on the 22nd day of July, 1929, the court denied defendant's motion for special findings, (Tr. 141). On July 30, 1929, the defendant made a request in writing that;

> "The court declares the law to be under the pleadings, the contract of insurance and the evidence in this case, the plaintiff is not entitled to recover against the defendant, General Insurance Company of America, and the decision and judgment of the court is in favor of the defendant."

A copy of this request was served upon counsel. They forthwith filed objection to the request. On July 30, 1929, the court formally denied the request, (Tr. 145) to which exception was taking in writing (Tr. 144).

In *Utah Mines & Smelting Company v. Beaver Company,* 262 U. S. 325, 43 S. ct. 577, 67 L. ed. 1004. it was said:

> "The plaintiff has submitted a motion to dismiss the writ of error." Of this we first dispose. The ground of the motion is that the case was tried by the court without a jury; that no exception was taken during the trial and no requests for special finding, or a declaration of law, made during the progress of the trial; that the court gave its decision and a general finding orally and directed judgment for the defendant which was duly entered; that nearly three months later, on motion of plaintiff and against defendant's objection, the court made and filed special findings of fact. The defendant challenges the power of the court to

make these special findings and insists that they should be disregarded, in which event, nothing substantial is left for review. All of the proceedings, including special findings, happened at the same term. The rule is that during the term the record is "In the breast of the Court," and may be altered during that time as the interests of justice require.

Goddard v. Ordway (Phillip v. Ordway) 101 U. S. 745-752; 25 L. Ed. 1040143; Ayres v. Wiswall, 112 U. S. 187-190, 28 L. Ed. 693-4; Dolph v. Tyack, 14 How. 297-312, 14 L. Ed. 428-435; Dowell v. Tilton, 119 U. S. 637-643, 30 L. Ed. 511; Bassett v. United States, 9 Wall. 38, 41 L. Ed. 548-9.

In *McCandless v. Haskins* et al., Eighth Circuit, 28 F. 2nd, 693, it is said:

"After the judgment assailed had been entered, the plaintiff filed a request for a declaration of law to the effect that on the uncontradicted evidence as the same appeared from the pleadings and evidence, the plaintiff was entitled to a recovery." The court entertained this application and on due consideration, denied the same. This is now urged by the plaintiff in error as against this defendant, contending the same was final after judgment, hence came too late and therefore cannot be considered by this court. In this contention, we think defendants in error are wrong. See Utah Mines v. Beaver, 262 U. S. 325, 43 S. ct. 577, L. Ed. 1004; Commonwealth Casualty Company v. Aitchner, 18 Fed. 2nd 879, a decision of this court, both cases holding that during the term at which a judgment order or decree is entitled, the same is "in the breast of the court."

In *Muentzler v. Los Angeles Trust & Savings Bank,*

3 F. 2nd 222, a decision from the Seventh Circuit, the opinion being written by Judge Evans, it is said:

> "Neither findings nor request for findings were made. There appears to have been no motion made by either party at the close of the evidence. Under the rule announced in Raymer v. Netherwood Supra, this would be fatal to the defendant's rights to consider the evidence, and we would be limited merely to an examination of the pleadings and the judgment. The sufficiency of the former to support the latter not being a matter of legitimate dispute in this case. The decision in the Raymer v. Netherwood case was rendered without our attention having been called to Section 269 of the Judicial Code as amended by the Act of February 26, 1919, Comp. St. Ann. Supp. 1919, Paragraph 1249. This section was intended to and did govern the disposition of cases on appeal whether civil or criminal, legal or equitable, and applies to all actions at law including those wherein the jury is waived. We see no persuasive reason why this remedial section should not apply to common law actions tried by the judge without a jury.
>
> Waivers of jury trials usually occur where the facts are particularly free from controversy and in cases like the present where the real controversy is one of law. Such waivers lessen expense to the litigants and to the Government and expedite the trial of cases and should not be discouraged.
>
> In the present case it appears that the court was fully apprised of the facts that the defendant denied any and all liability. There was no question of the amount of liability, if any existed, nor of the bank organization, its by-laws, etc., nor was there any dispute in reference to the fact that Jenkins who sent the telegram extending the Film Company credit was Vice-President and Director of the defendant. * * * *

These and other facts being conceded, plaintiff asserted and defendant denied liability. Each party sought a judgment. Plaintiff for the amount alleged in its declaration and the defendant for a dismissal of the action. It may be somewhat careless to omit to prepare and file former motions, just as it is sometimes an oversight to fail to except the rulings in those courts (fortunately not very numerous) where exceptions are not allowed as a matter of course. But what is the purpose of a formal motion or an exception? It is to apprise the court of the litigants' position that it may, in furtherance of justice, correct such ruling if convinced of its error. Where both parties have fully and fairly presented the evidence as here and argued the questions of law fully, it seems particularly appropriate that Section 269 of the Judicial Code should be invoked to save the litigants from the consequence of an oversight by counsel.

Quite different is the situation where counsel do not make known their position or where (as in case of instructions to the jury) the court's attention is not directed to its failure to completely cover the issues or to a misstatement of law or fact.

Likewise an entirely different question is presented when on the trial a question is asked and without further objection the answer is given. Finding it unsatisfactory, objection is then made and the court is asked to strike out the answer. Generally speaking, such rulings cannot be assailed on appeal for want of objection or exception, but the line of demarkation between such cases and the present is clear. In the instant case the court was fully apprised of the litigants position and informed that counsel vigorously opposed an adverse ruling. In other cases, the court's attention was not called to its error and no opportunity was given to correct the oversight or mistake, nor was it informed that counsel felt aggreived at such ruling.

> Moreover, since the decision in Raymer v. Netherwood was announced, this court has held in Operators Piano Company v. First Wisconsin Trust Company, C. C. A. 283 Fed. 904; Kokomo Steel Wire Company v. Republic of France, C. C. A. 268 F. 917; Quarles v. City of Appleton, C. C. A. 299 F. 508, that an assignment of error challenging the sufficiency of the evidence to support any judgment may present a reviewable question of law. It follows that the decision in Raymer v. Netherwood Supra is overruled."

Under these decisions, the appellant is clearly entitled to a review of all matters covered in its assignments of errors and specifically to a review for the purpose of determining whether or not plaintiff was entitled under the pleadings, contract of insurance and evidence to recover against the defendant.

What we have said in the discussion of prior assignments of error may be considered in connection with the present assignment and without a repetition of either the arguments or authorities heretofore presented.

Other assignments of error are specific and have been covered in the discussion as to the sufficiency of the evidence to justify a recovery. We are insisting upon each of them, but believe it needless to repeat what has already been said.

Assignment of Error XII

The assignment itself gives our viewpoint and is as follows:

> "Because the uncontradicted evidence shows that the immediate cause of cancellation of the

> policy was the failure of Reynolds to place the policy in the safety deposit box in the First National Bank of Filer, but on the contrary retained the policy in his possession and thereafter surrendered the policy to defendant's agent, with a statement in writing that the policy had been replaced with the Hardware Mutual Insurance Company, and the uncontradicted evidence further shows that plaintiff opened the safety deposit box and knew, or by the use of her natural senses could have known that the policy was not, in fact, in the safety deposit box, and plaintiff knew at that time that the mortgagors were in default upon the mortgage and consequently plaintiff is estopped from contending that the policy was not surrendered for cancellation with her knowledge and consent."

We respectfully submit that there was no liability upon the appellant company under its policy at the time this fire occured in August, 1928, and that the case should be remanded with instructions to dismiss.

If, however, it should be the opinion of the court that we are incorrect in our contentions, in any event, the judgment as entered should be modified. Condition 5 of the Mortgage Clause provides:

> "Whenever this company shall pay the mortgagee any sum for loss or damage under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, this company shall to the extent of such payment, be thereupon legally subrogated to all of the rights of the party to whom such payment shall be made, under all security held as collateral to the mortgage debt, and may, at its option, pay to the mortgagee the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a

full assignment and transfer of the mortgage and of all other security; but no subrogation shall impair the right of the mortgagee to recover the full amount of the claim."

Assignment of Error XVIV deals with this provision and reads:

"The court erred in ordering judgment entered in favor of the plaintiff and against defendant without containing a provision to the effect that upon payment of said judgment to the mortgagee, the defendant shall, to the extent of such payment, be subrogated to all the rights of the mortgagee, and that the defendant shall receive a full assignment and transfer of the mortgage and all other securities held by the plaintiff as provided in condition 5 of the Mortgage Clause attached to the insurance policy in question." (Tr. 225).

The Reynolds Brothers, as mortgagors, clearly had no claim against the appellant under the policy, and no liability as to them existed. Mr. Reynolds, without any possibility of a doubt, permitted the policy to expire and surrendered it or authorized its surrender to the appellant company and its agent. The mortgagee bases her sole right to recover upon the provisions of the mortgage clause. Since she relies upon the mortgage clause, and should the court sustain her right of recovery, the appellant company is clearly entitled to every protection afforded it by the mortgage clause, and the main consideration for the agreement made in the mortgage clause is the subrogation rights provided for in condition 5. The appellant is very positive in its contention that there is no liability under all of the circumstances to either the mortgagor or to the mort-

gagee. The mortgagors in reality, admitted that they had no claim under the policy because they did not file a proof of loss and neither did they join in the suit as a parties plaintiff. This being true, should the court sustain the mortgagee's right to recovery, it should extend to the company the protection afforded by condition 5 and provide in the judgment that the mortgagee shall, upon the payment of the judgment, comply with the provisions of the condition.

Respectfully submitted,

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W. ORR CHAPMAN,
RALPH S. PIERCE,
Attorney's for Appellant.

No. 5982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GENERAL INSURANCE COMPANY OF AMERICA, a corporation, *Appellant*,

vs.

ROSE M. ALLEN, *Appellee.*

Brief of Appellee

On Appeal From the District Court of the United State for the District of Idaho, Southern Division.

CHARLES C. CAVANAH, District Judge

W. D. GILLIS,
Boise, Idaho.

JOHN W. GRAHAM,
Twin Falls, Idaho.
Attorneys for Appellee.

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CHARLES C. CAVANAH, District Judge

STATEMENT OF THE CASE

This is an action brought in the District Court of Twin Falls County, State of Idaho, by Rose M. Allen, plaintiff below, appellee herein, to recover on an insurance policy which was issued by the General Insurance Company of America, defendant below, appellant herein, on September 20, 1924, to C. L. and R. A. Reynolds, which policy insured a building upon property situated in the town of Filer, Idaho (Tr. 14). To this policy was attached a

Standard or Union mortgage clause form (Tr. 29) by the provisions of which the loss or damage under policy was made payable to Rose M. Allen, as mortgagee (Tr. 29). The building insured was totally destroyed by fire on August 29, 1928 (Tr. 60). The amount of the policy was for $10,000.00. Proof of loss was made by the mortgagee (Tr. 199).

Prior to 1919 the Filer Hardware Company was conducting a hardware business in the City of Filer in the building in question. Mr. Allen, the husband of the appellee herein, was the owner of considerable stock in the company. He died in the year 1919 and in the settlement of the estate his stock in the Filer Hardware Company was sold to Reynolds brothers, in payment of which Richard A. Reynolds and Charles L. Reynolds and their respective wives, made executed and delivered to the appellee herein their certain promissory notes (Plaintiff's Exhibits 6, 7, 8 and 9, Tr. 172-176). The total of the notes given was something like $12,629.73. As security for said notes a mortgage was executed by the Reynolds brothers and their wives for the total sum of the indebtedness which notes and mortgage were dated June 20, 1919 (Tr. 177). At the time these notes and mortgage were executed by Reynolds brothers in the office of Mr. Hazel, attorney for the appellee herein, it was agreed that insurance should be taken out on the building as additional security for not less than $10,000.00 with

a mortgage clause attached, payable to Mrs. Allen (Tr. 62). In accordance with that agreement a policy was taken out as agreed upon with a mortgage clause attached through one Mr. Anderson, an insurance agent at Filer (Tr. 62). Mrs. Allen, appellee herein, was then residing at Filer and the policy was put in Mrs. Allen's box at the First National Bank of Filer, the policy being left there either by the agent, Mr. Anderson, or by Mrs. Allen herself. This policy was a one year policy and was renewed from year to year until 1924 (Tr. 62). Shortly after this Mrs. Allen moved to Twin Falls, Idaho, and resided in Twin Falls up until April, 1924, when she moved to San Diego, California, where she has resided ever since.

Sometime in April, 1924, Mr. R. A. Reynolds spoke to Mrs. Allen about securing a five-year policy upon the premises so as to avoid the trouble and annoyance of renewing each year, which arrangement was agreeable to Mrs. Allen (Tr. 63-119). In September, 1924, Mr. Reynolds took up the matter with Mr. Anderson, agent of the defendant company, in regard to a five-year policy, which the policy in question was represented to be by Mr. Anderson (Tr. 63-119) and would be a cheaper policy than the one he had been carrying (Tr. 63). Mr. Reynolds thereupon instructed Mr. Anderson to make out the policy, and to put it in Mrs. Allen's box at the bank (Tr. 63). Mr. Reynolds did not

see the policy after it was made out in Mr. Anderson's office and did not know what Mr. Anderson did with the policy (Tr. 63). Mrs. Allen instructed Mr. Reynolds in April, 1924, to leave the new policy that was to be issued with the First National Bank at Filer, to be placed in her safety deposit box (Tr. 66). Mrs. Allen never saw the policy after it was issued.

Mr. Anderson was agent of defendant company at Filer, Idaho, at the time the policy in question was issued and continued as such up to May, 1925, when he sold out his insurance business to Raymond F. Graves and later F. C. Graves and Son took over the business (Tr. 88-105), and they continued as such agents up to time of trial. All the records, supplies and policies issued (ten or fifteen in number) and kept by Mr. Anderson for safe keeping were turned over to Raymond Graves (Tr. 89-95).

On September 20, 1924, the date of the policy in question, the first year's premium was paid to Mr. Anderson. The second year's premium was due September 20, 1925, but was not paid by R. A. Reynolds to F. C. Graves & Son until March 2, 1926, (Plaintiff's Exhibits 4 and 5, Tr. 170-171). No other premiums were paid by Mr. Reynolds.

No demand, either by F. C. Graves and Son or the defendant company, for the payment of any premium on this policy was ever made upon Mrs.

Allen and she was never notified that the premiums had not been paid (Tr. 67-92-108).

The building was totally destroyed by fire on August 29, 1928, and was worth an amount far in excess of the face of the policy (Tr. 60-79). There was due Mrs. Allen on her notes and mortgage at the time of trial $10,675.82 (Tr. 65) which was in excess of the face of the policy.

After issuing of the policy the question of insurance never came up for discussion until after the fire (Tr. 73-74). After the fire her brother wired her that the building had been destroyed by fire and she then wired back to her brother that the policy was in her box at the bank (Tr. 74). He answered that the policy could not be found in the bank. She then came on to Filer to look after the matter herself (Tr. 74).

A brief resume of the proceedings that actually took place in the trial court in this case will give us a better understanding of the issues that should be considered in this Court.

This action was commenced in the District Court of the Eleventh Judicial District of the State of Idaho, in and for Twin Falls County. A demurrer was filed in that court by the defendant (Tr. 32) and afterwards a petition for Removal to the Federal Court at Boise was filed and case removed. Afterwards the demurrer was argued in the Feder-

al Court and the same was overruled (Tr. 33), but no exceptions to the overruling of said demurrer were saved or preserved by the defendant. Afterwards a stipulation waiving jury was filed and the defendant filed its answer under date of March 1, 1929, (Tr. 34). The case was tried to the court on April 29 and 30, 1929, (Tr. 52). The same was argued orally and written briefs were filed by both parties and the matter taken under advisement by the court. On July 1st the court rendered its memorandum opinion (Tr. 132-135). Afterwards on July 2nd a judgment was entered for plaintiff in accordance with the memorandum opinion.

No request for special findings or declaration of law was made by the defendant prior to the entry of the judgment.

Afterwards on July 11, 1929, the defendant filed a motion asking that special findings be made by the court (Tr. 137-138). Objections were filed to said request by the plaintiff below (Tr. 140) and on July 22, 1929, the court denied the request for special findings (Tr. 141-2) to which ruling no exceptions were saved or preserved by the defendant.

On July 30th, the defendant filed a request for declaration of law in favor of defendant (Tr. 142). Objections were filed to this request (Tr. 143) and on July 30, 1929, the court denied the application of the defendant for declaration of law (Tr. 145-146)

to which ruling the defendant saved an exception (Tr. 144-145). On July 30, 1929, the court entered a Nunc Pro Tunc order correcting judgment by allowing the defendant credit for two year's unpaid premium on the judgment which had theretofore been entered (Tr. 146-147). On August 1, 1929, a motion for new trial was filed (Tr. 148-152). On September 6, 1929, the proposed bill of exceptions together with suggested amendments by the appellee herein were considered by the court as was also the motion for new trial and the bill of exceptions was allowed and the motion for new trial denied (Tr. 215). It seems that the order denying the motion for a new trial and the order allowing the bill of exceptions are not embodied in the transcript.

On September 24, 1929, the petition for appeal was filed, appealing from the judgment, the order denying the defendant's request for declaration of law and the order of the court denying the defendant's petition for new trial (Tr. 215-216).

ARGUMENT

We have set forth in detail all the different steps taken in the trial court in this case so that this Court can see at a glance the subjects that are rightfully presented for review in this Court.

No request for special findings and no request for declaration of law having been made to the

trial court before the entry of judgment, and the case having been tried to the court without a jury, the only matters that can be considered by this Court on appeal are:

FIRST: SUFFICIENCY OF THE PLEADINGS TO SUPPORT THE JUDGMENT.

Appellant in its brief, Assignment of Error XVIII (Appellant's Brief p. 14) claims that the trial court erred in overruling defendant's demurrer to complaint. Inasmuch as no exception was preserved by the defendant to the order of the court overruling the demurrer (Tr. 22) that matter cannot be presented for review in this Court. Under this Assignment of Error let us consider the complaint to see whether or not it states a cause of action against the defendant below (Tr. 9-13, incl.)

It is alleged that the defendant is a corporation, with headquarters at Seattle, Washington, and is engaged in fire insurance business in Idaho; that on the 20th day of September, 1924, R. A. Reynolds and C. L. Reynolds were and are now the owners of certain property in Filer, Idaho; that on said date the said Reynolds brothers applied to Arthur E. Anderson, agent of the defendant company at Filer, Idaho, for a $10,000.00 policy of fire insurance on their property in Filer; that they paid the premium demanded and that a *Five Year Policy* was issued to them, a copy of the policy and all

riders were attached to the complaint; that on the 29th day of August, 1929, the building upon which insurance was held, was totally destroyed by fire; that the loss sustained by plaintiff was $10,000.00, and the value of the building was in excess of said sum; that previous to the issuance of said policy the said R. A. Reynolds and C. L. Reynolds had executed notes and mortgage on property in question to plaintiff in the sum of $12,647.00, and that the defendant company, at the request of Reynolds brothers, at the time of the issuance of the said policy, attached a mortgage clause to said policy, payable to plaintiff; and that said mortgage debt had not been paid, and that there was then due thereon $10,313.80; and that since the building so insured was destroyed, the real property left had no value. In paragraph VIII of the complaint it is alleged that the policy provides that the defendant might cancel said policy as to Reynolds brothers but that it shall remain in full force for benefit of mortgage for ten days after notice to mortgagee; that no notice of cancellation, or any other notice had ever been given to plaintiff; that plaintiff had no knowledge of any cancellation, if any was made ,and that no cancellation had ever been made; and that she at all times stood ready to pay any premium of any kind upon said policy, but that no demand had ever been made upon her for the payment of any premium.

That plaintiff on September 20, 1928, desired to make proof of loss and asked that proof of loss forms be sent to enable her to make proof of loss, and that an adjuster be sent to adjust loss; that defendant failed to furnish forms for proof of loss but that plaintiff on October 11th, 1928, furnished defendant proof of loss (Tr. 9-13, inc.).

The allegations in paragraph VIII of the complaint anticipate the defenses by the Insurance Company of cancellation, and in our judgment, were not necessary to entitle plaintiff to recover. That was a matter of defense and had to be pleaded by defendant. The defendant had refused to pay the loss and had advised plaintiff of the reason why (Plaintiff's Exhibit 18, Tr. 190), and for that reason those allegations were inserted in the complaint as an extra precautionary step.

There was a direct allegation in the complaint that the contract of insurance set up in the complaint was a five year contract and that the first and second year's premium had been paid by the mortgagors which showed that the contract had been in full force and effect and that insofar as the mortgagee was concerned had never been cancelled in the manner and method provided in the mortgage clause.

Counsel for Appellant in their brief discuss the terms and conditions of the contract between the

mortgagors and the Insurance Company. That is not the issue in this case. The Standard or Union Mortgage Clause attached to the policy consitutes the contract between the Insurance Company and the mortgagee. That Standard Mortgage Clause constitutes a separate and independent contract between the Insurance Company and the mortgagee, unaffected by any conditions which invalidated the policy as to the mortgagors.

It should be unnecessary to cite any authorities as the rule of law has been so long and firmly established by all courts that they do not even discuss it any more. We will, however, refer to a few early cases that show conclusively the logic and reason for the rule.

In the case of Syndicate Ins. Co. of Minneapolis vs. Bohn, 65 Fed. 165 (C. C. A. 8th), which is the earliest Federal case we have found, we find a very able and lengthy discussion of the question. In that case the court said:

> "But one of the 'following stipulations', to which the first sentence of this mortgage clause is 'subject', is that this insurance, as to the interest of the mortgagee only, 'shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured'; and it is too clear and too well settled to admit of discussion that no act or neglect of the mortgagors, done or permitted after the policies and mort-

> gage clauses were delivered to the mortgagee, although fatal to the mortgagor's recovery, could deprive the uninformed mortgagee of its indemnity. City Five Cents Sav. Bank v. Pennsylvania F. Ins. Co. 122 Mass. 165; Phoenix Ins. Co. vs. Floyd, 19 Hun. 287; Hartford F. Ins. Co. v. Olcott, 97 Ill. 439, 455."

And later in the opinion the court used this language:

> "It is true that Bohn paid the premiums for this insurance, but a promise to pay or indemnify is no less binding when the consideration is paid by a third party than when it comes directly from the payee or the insured. Hartford F. Ins. Co. v. Olcott, 97 Ill. 439, 454, and cases there cited. The agreement evidenced by this mortgage clause was therefore a valid contract between the mortgagee and the insurance companies, made upon sufficient consideration, for the evident purpose of protecting the indemnity guaranteed to the mortgagee by these companies against the destruction by any act or neglect of the mortgagors."

and later on the court said:

> "If the insurance companies had notified this mortgagee at any time before the loss that the original policies were or might have been invalid at the inception of the contracts between them, the latter would undoubtedly have surrendered the contracts and sought insurance elsewhere. They waited until the loss had oc-

curred, and it is now too late for them to retract their representations. They are estopped to deny the truth of their statement, to the manifest injury of the mortgagee."

The Supreme Court of Mississippi in the case of Bacot vs. Phoenix Ins. Co. 50 So. 729, said:

"If, then, the contract between the mortgagee and the insurance company is a wholly independent contract from that of the original owner or mortgagor, how can it be that any but the conditions contained in the mortgagee's contract affect his rights? His rights are independent, not derivative from the mortgagor's contract. Under this independent contract, he is not a mere appointee of the mortgagor to receive the proceeds of the policy, in case of loss, by virtue of and under the contract of the mortgagor, but the mortgagee gets an independent right, an independent contract with the insurance company, whereby the insurance company insure his individual interest in the property."

And later on the court used this language:

"We unhesitatingly hold that the contract of Bacot with the insurance company as mortgagee was an independent contract, dependent for its validity alone upon the conditions placed by the statute in the mortgage clause, and unafected by any conditions which invalidated the policy as to the mortgagor, whether prior or subsequent to the insertion of the mortgage

clause. Our views of the mortgage clause can be stated in no better language than it is put in the case of Hastings v. Westchester F. Ins. Co. 73 N. Y. 141: 'The intent of this clause was that in case, by reason of any act of the mortgagors or owners, the company should have a defense against any claim on their part for a loss, the policy should nevertheless protect the interest of the mortgagees, and operate as an independent insurance of that interest, and indemnify them against loss resulting from fire, without regard to the rights of the mortgagors under the policy; and, to effectuate that intention, we should hold that, as against the mortgagees, the defendant cannot set up any defense based upon any act or neglect of the mortgagors, whether committed before or after the issuing of the policy, or the making of the agreement between the company and the mortgagees . . . The intent of the clause was to make the policy operate as an insurance of the mortgagors and the mortgagees separately and to give the mortgagees the same benefit as if they had taken out a separate policy, free from the conditions imposed upon the owners, making the mortgagees responsible only for their own acts . . . This provision, in case the policy were invalidated as to the mortgagors, made it, in substance, an insurance solely of the interest of the mortgagees by direct contract with them, unaffected by any questions which might exist between the company and the mortgagors.' "

This Court had the question before it in the case

of Brecht vs. Law, Union & Crown Ins. Co. 160 Fed. 399, and at page 403 used this language:

> "When the policies sued on were issued, it was not unusual for insurance companies to insure the interest of mortgagees by attaching to their policies slips containing what is known as the 'Union Mortgage Clause', whereby the insurance company agreed to pay to the mortgagee the amount to become due under the policy as his interest might appear, regardless of subsequent breaches of certain conditions of the policy by the mortgagor. The following cases arose under policies containing such a clause: Magoun v. Firemen's Fund Ins. Co., 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370; National Bank v. Union Ins. Co., 88 Cal. 497, 26 Pac. 509, 22 Am. St. Rep. 324; Hastings vs. West chester Ins. Co. 73 N. Y. 144; Syndicate Ins. Co. v. Bohn, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614. Now, if it had been the intention of the defendant to insure the plaintiff in error absolutely and without reference to any breach of the conditions of the policies by the St. Johns Lumber Company, such insurance could have been effected by the use of the 'Union Mortgage Clause' in defining the rights of the plaintiff in error under the policies; but, instead of doing this, the parties adopted a form merely designating him as the person to whom the loss, if any, should be payable, a form which under well-settled rules subjects the appointee to the risk of all acts and omissions of the person to whom the policy was issued."

SECOND: ERRORS OF LAW OCCURRING AT THE TRIAL AND DULY EXCEPTED TO BY THE DEFENDANT BELOW.

Let us now consider the second proposition that can be considered by this Court upon review which is Errors of Law occurring at the trial and duly excepted to by the defendant below. Rule 63 of Rules of Practice of the U. S. District Court for the District of Idaho provides:

> "In actions at law in which a jury has been waived as provided by the act of Congress, it shall be in the discretion of the court to make special findings of fact upon the issue raised by the pleadings. Ordinarily, the court will make such findings on request of either party, if such request be made on or before the submission of the cause for decision."

See also Sections 649 .and 700, U. S. Compiled Statutes.

This Court has in a number of cases discussed the rule and we will refer to only a few cases. In the case of Dunsmuir vs. Scott, (C. C. A. 9th) 217 Fed. 200, at page 202 the court said:

> "The question whether or not, at the close of the trial, there is substantial evidence to sustain a finding in favor of one of the parties to the action is a question of law which arises in the progress of the trial. Where the trial is before a jury that question is reviewable on ex-

ception to a ruling upon a request for a peremptory instruction for a verdict. Where the trial is before the Court, it is reviewable upon a motion which presents that issue of law to the Court for its determination at or before the end of the trial. In the case at bar there was no such motion and no request for a special finding. We are limited, therefore, to a review of the rulings of the Court to which exceptions were reserved during the progress of the trial."

In the same case the court used this language:

"Under the provisions of Sec. 649 and 700 U. S. Compiled Statutes the rule is well settled that if a jury trial is waived and a general finding is made by the court, review in an appellate court is limited to such rulings of the trial court in the progress of the trial as are presented by a bill of exceptions, and that the bill of exceptions cannot be used to bring up the oral testimony for review. (See long list of cases cited). In Dirst v. Morris, 14 Wall, 20 Law Ed. 722, Mr. Justice Bradley said 'But as the law stands, if a jury is waived and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence.' "

In the case of Callan vs. U. S. Spruce Production Corporation (C. C. A. 9th) 28 Fed. (2d) 770, the court held:

"On appeal, in a case tried to the court from

> a decree of dismissal entered on a general finding, where no exceptions were taken and no request for findings was made, no question for review is presented; Judicial Code, Sec. 269 (28 USCA, Sec. 391) not authorizing a review of the evidence."

Again in the case of Sierra Land & Livestock Co. vs. Desert Power & Mill. Co., (C. C. A. 9th) 229 Fed. 982, the court held that the appellate court cannot on appeal inquire into the sufficiency of the testimony to support a general finding, where at the close of the testimony there was no application for a declaration of law that upon the whole case the finding should be for the plaintiff or defendant.

This Court again in a more recent case, Feather River Lumber Co. vs. United States, 30 Fed. (2d) 642, at page 643 of the opinion said:

> "A jury trial having been waived by the written agreement of the parties, the case was tried to the court. At the conclusion of the testimony both parties asked for special findings, but none were made. The court, having found for the plaintiff, caused a judgment to be entered against the defendant for damages in the sum of $41,575.80 and the costs of the action. The defendant assigns as error the denial of its motion for dismissal and non-suit at the close of the government's case, made on the ground that the evidence adduced was insufficient to sustain a finding in favor of the

plaintiff. The denial of that motion cannot avail the defendant as ground for reversing the judgment. After it was denied the defendant proceeded to introduce its testimony, and at the close of the trial it made no motion for judgment on the ground of the insufficiency of the evidence to sustain the complaint. The rule that under the circumstances here presented the evidence cannot be reviewed by an appellate court has been so frequently applied by this and other courts as to render unnecessary a review of the authorities. Deupree v. United States (C. C. A.) 2 Fed. (2d) 44, 45; Clark v. United States (C. C. A.) 245 Fed. 112; Fleischmann Co. vs. United States 270 U. S. 249, 46 S. Ct. 287, 70 L. Ed. 624. A general finding having been made by the court below, the review in this court is limited to the rulings of the trial court in the progress of the trial. Dunsmuir v. Scott (C. C. A.) 217 Fed. 200; New York Life Ins. Co. v. Dunlevy (C. C. A.) 214 Fed. 1; Pabst Brewing Co. v. Horst Co. (C. C. A.) 264 Fed. 909."

Even if the request for special findings made by the defendant in this case (Tr. 138) might be considered by this Court on review the same was not sufficient in law as it failed to specify the special findings desired. As stated in the case of Feather River Lumber Co. vs. United States, supra, at page 643 of the opinion:

"The records show that both parties made

> oral request for special findings, but such a request without specifying the findings desired does not serve to bring to the court's attention any question of law."

This Court must bear in mind, however, that no exception was saved to the ruling of the trial court on this request for special findings (Tr. 141). In the case of Fleischmann Co. vs. United States, decided March 1, 1926, 270 U. S. 350, 70 L. Ed. 624, in discussing the question as to the subjects that are for review in an appellate court where no special findings of fact or declaration of law is requested before the entry of the judgment in the trial court, at page 629 of L. Ed. the court said:

> "It is settled by repeated decisions that, in the absence of special findings, the general finding of the court is conclusive upon all matters of fact, and prevents any inquiry into the conclusions of law embodied therein, except insofar as the rulings during the progress of the trial were excepted to and duly preserved by bill of exceptions, as required by statute." A long list of authorities is cited.

Again in the same opinion the court used this language:

> "To obtain a review by the appellate court of the conclusion of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the pro-

positions of law to the court and obtain a ruling on them."

From the above it is conclusively shown that the only matters that can be considered by this Court are questions involving the admission or rejection of evidence over the objections of the defendant, and to which an exception was saved.

In the 4th Assignment of Error in Appellant's brief, page 7, the matter of permitting the witness R. A. Reynolds to answer a question was assigned as error, but we do not find the matter discussed in the brief and therefore take it that the same has ben waived. Even if the matter could be considered there is no statement or allegation that the answer was prejudicial.

In the 5th Assignment of Error of Appellant's brief, page 8, it is alleged that the court erred in sustaining objection to a certain question asked Rosa M. Allen in cross-examination. This error has not been discussed in the brief other than the simple fact of the assignment thereof. In fact it shows conclusively that the court did afterwards permit the witness to answer the question, so that no prejudice or error could arise thereon.

The 6th Assignment of Error as shown in Appellant's brief, pages 9 and 10, shows an attempted inquiry into some matter which was not raised by the pleadings and was entirely immaterial upon

rebuttal. Furthermore, the matter was not discussed by counsel in their brief.

Assignment of Error No. 8 appearing in Appellant's brief, page 40, raises the question as to the right and the effect of a request for declaration of law after the entry of the judgment. A request for declaration of law was filed by the defendant on July 30, 1929, and denied by the court on the same day (Tr. 142-145-146).

The question now arises as to what is the effect of this request at this late date. The case of Utah Mines & Smelting Co. vs. Beaver Co. 262 U. S. 325, 67 L. Ed. 1004, is cited for the purpose of showing that the trial court has the right to consider such a request. Counsel for appellant reason therefrom that by reason of the fact that the court had the power to consider a request after the entry of the judgment that its action in denying the request opens up the whole question of the propositions of law involved in the case the same as though it would had the request been made before the entry of the judgment. We believe that the rule announced in that case will bear no such construction. The most that can be said for the rule is that the trial court has the discretionary power to consider a request of this character after the entry of the judgment and that the action of the trial court is discretionary and is not subject to review except for an abuse of dis-

cretion. If our interpretation should be placed on the rule above mentioned and applied to the facts in the case at bar, you will readily see that no argument is made to show any abuse of discretion on the part of the trial court.

The case of Muentzer vs. Los Angeles Trust & Savings Bank, (C. C. A. 7th) 3 Fed. (2d) 222, is cited by appellant in support of its position that this Court should, in the case at bar, consider the assignment of error challenging the sufficiency of the evidence to support the judgment, claiming that section 269 of the Judicial Code liberalized the power of the appellate court to that extent. We have been unable to find that the case above referred to from the Seventh Circuit has been cited or discussed by a single court since its announcement.

Counsel for Appellant must have overlooked something. That question was before this Court in the case of Callan vs. U. S. Spruce Production Corporation, 28 Fed. (2d) 770, and the court in passing upon it used this language:

> "To say that Section 269 of the Judicial Cde (28 USCA Sec. 391) authorizes a review of the evidence upon such a record would be to hold that it repeals the sections of Revised Statutes above cited. We do not think it is intended to have that effect."

We must, therefore, consider that question as settled in this Court.

Appellant's Assignment of Error No. IX claims that R. A. Reynolds, acting for himself and as agent for the plaintiff below, on October 4, 1926, consented to the cancellation and thereby cancelled the policy in question.

The evidence shows that the plaintiff instructed Mr. Reynolds to have this policy when executed left at the Bank in Filer so it could be placed in her safety deposit box (Tr. 66-73); that Mr. Reynolds then instructed Mr. Anderson, the agent of the defendant company, to deliver the policy to the bank where it could be put in Mrs. Allen's bank box (Tr. 63). This evidence is not denied.

The Appellant contends that this policy was in Mr. Reynolds' possession on October 4, 1926, and on that date he delivered it up for cancellation to Mr. Graves, and that the policy was then cancelled by Mr. Graves and mailed to the company. This was denied by Reynolds, who contended he never saw the policy after it was issued (Tr. 59). The contention of plaintiff is that she never authorized Mr. Reynolds or any other person to cancel this policy (Tr. 87), and that the contract of insurance insofar as she was concerned never was cancelled.

An extended argument appears in Appellant's brief under this title on the theory that Mrs. Allen

was careless and negligent in not examining her papers to see that the policy was in full force and effect and that she should be estopped now from recovering on the policy. The provision of the mortgage clause in regard to cancellation (Tr. 30), condition III thereof, is as follows:

> "This company reserves the right to cancel at any time as provided by its terms but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after the notice to mortgagee (or trustee) of such cancellation, and shall then cease; and this company shall have the right on like notice to cancel this agreement."

If the insurance company in this case had used half the care in protecting its rights in regard to cancellation by notifying Mrs. Allen in accordance with the provisions of her contract, that they now claim Mrs. Allen should have used, there would have been no occasion for this law suit, as Mrs. Allen could have then protected her rights by securing other insurance or paying the premium.

On the question as to the right of the mortgagor, as the agent of the mortgagee, to cancel the policy of insurance, we wish to cite one case only. City of New York Insurance Co. vs. Jordan, (C. C. A. 5th) 284 Fed. 420. At page 422 the court said:

> "To say the least, authority of an agent to terminate existing insurance is not plainly con-

> ferred by a request of the owner of property that property already insured be kept insured —to keep the owner protected 'at any time any company cancelled a policy.' The evidence indicates the absence of any intention to empower the agents by their voluntary act to create a situation calling for new insurance. The extent of the authority of the agents is determined by the terms of the request made by the principals. The fact that there had been a single instance of the principals accepting a policy issued by the agents in place of one which was cancelled without notice to the principals cannot properly have the effect of giving the request or direction a meaning different from that expressed by its language."

We will not continue the discussion of this subject further as the general finding of the trial court is amply supported by evidence.

Estoppel

There is another incident that occurred which estops the defendant from claiming that the policy was not in full force and effect. It appears that on July 30, 1929, the trial judge of his own motion signed a Nunc Pro Tunc order correcting the judgment allowing the defendant credit for two years premium on the policy, namely, the premium due September 20, 1926, and September 20, 1927 (Tr. 146-147). A copy of this order correcting the judgment was served upon counsel for the defendant

and no objections were made to the same, the result being that they have accepted credit for the two years' premium without any protest to the trial court and now claim that the policy was cancelled for non-payment thereof. It seems inconsistent for the defendant to accept credit for the two years' premium which in law amounts to the payment of the premium by the plaintiff and then claim that the policy has been cancelled. The result of that action is the same as though the defendant had pleaded in its answer a counter-claim for the two years' premium. If it had done so then it would have been estopped from claiming that the policy was not in full force and effect. In the case of Johnson vs. Dakota Fire and Marine Insurance Co. (N. D.) 45 N. W. 799, the court held: (Syllabus)

> "At the time of the service of defendant's answer to the plaintiff's complaint in this action, the defendant had full knowledge of all the facts constituting the grounds of forfeiture of said policy by the plaintiff; and with such knowledge, and by way of counter claim in the answer, defendant seeks to recover from the plaintiff as a consideration for the issuance of the policy. Held, that pleading such counter claim operated as a waiver of the forfeiture of the policy. The policy was not void, but was voidable at the option of the Insurer. After knowledge of the forfeiture, defendant saw fit to demand judgment for its premium. This was equivalent to an independent action for the

premium, and waived the forfeiture. If the answer had not, among other defenses, pleaded a forfeiiture which went to the inception of the policy, and which would, if established, defeat the premium note ,the case would have been otherwise."

Policy Was a Five-Year Contract

In Appellant's brief, pages 14-25, inclusive, Assignment of Error XVIII contends that the contract in question was a one year policy instead of a five year policy. In the interpretation of this contract the same becomes a question of law and fact. The provision of the policy necessary to a consideration of this question is shown in the Transcript 130-131 in the discussion of this question by the trial judge. The provision of the policy referred to uses this language:

> "does insure C. L. and R. A. Reynolds for the term of five years from the 20th day of September, 1924, at noon, to the 20th day of September, 1929, at noon."

This provision, in our judgment, is so plain that it should not require any discussion as to what the intention of the parties was at the time the policy was issued. In addition to this, however, we find in the record (Tr. 63) that Mr. Anderson, the agent of the company at the time the policy was issued, represented the same to be a five-year policy. Again we find in the agent's record (Plaintiff's Ex-

hibit 3, Tr. 165), the record made by the agent himself at the time was in these words:

> "Term 5 years, effective September 20, 1924."

In defendant's Exhibit No. 20 (Tr. 200), being that part of the policy retained by the company after cancellation, we find a notation made by defendant's agent as follows:

> "Expires September 20, 1929."

And again in defendant's Exhibit No. 21 (Tr. 202), being the office record of the defendant company and the notation made by the defendant itself at head-quarters, we find the following:

> "From 9/20/24 to 9/20/29."

Furthermore, in defendant's Exhibit No. 22 (Tr. 203), the same being a letter written by the agent Raymond Graves to Reynolds brothers on September 21, 1926, we find this language:

> "Enclosed find renewal certificate for 5 year policy, covering the garage and dance hall building here."

In the light of all these facts, we contend that it shows conclusively the interpretation placed upon the provisions of the contract by the defendant itself was a five year policy and not a one year policy. In order to shorten this brief we will dispense with any further argument and refer to the trial

court's memorandum opinion, appearing in the transcript at pages 130-131-132-133-134.

The appellant in this case filed a motion for a new trial (Tr. 148-49-50-51) containing nearly all of the Assignments of Error urged by the appellant on appeal and contained in its Assignment of Errors herein. The motion for new trial was denied as shown by the certificate of the trial judge to the bill of exceptions (Tr. 215). And the action of the court is not alleged as error herein which would preclude a consideration by this Court of the matters urged in the motion for new trial. The action of the trial court on the motion for new trial is not subject to review in this Court.

Subrogation

In Assignment of Error No. XIX (Appellant's brief, page 47) it is urged by appellant that the court erred in not providing that the defendant could be subrogated to all the rights of the mortgagee by giving it a full assignment and transfer of the mortgage and all the securities held by the plaintiff.

The question of subrogation is a matter which can be amply protected by the trial court when the time arrives. Subrogation exists only as a matter of equity and then only when the defendant has paid Mrs. Allen in full all of the amount that is due her.

A similar question was presented to the Supreme Court of Idaho in the case of Carroll vs. Hartford Insurance Company, 28 Idaho 466. In that case a motion was presented in the trial court asking for subrogation and the court denied the same. At page 482 in discussing the question that court said:

> "Appellant contends that the court erred in denying its motion for subrogation. In passing upon that motion the court said: 'It is by the court ordered that the motion of the defendant for subrogation to the rights of the plaintiff under said mortgage in proportion to the amount of the verdict of the jury be, and the same hereby is, deferred until such time as defendant shall pay to the plaintiffs the amount of said verdict and judgment rendered thereon, or pay said amount into court for the use and benefit of said plaintiffs.'
>
> "It thus appears that the trial court did not definitely determine the question of subrogation. Clearly, under the law the appellant is not entitled to subrogation, in any event, until it has paid or offered to pay the judgment in this case. Counsel for respondent contend that there is no subrogation clause in the policy and therefor it must be covered by the common-law rule, and cite 1 Clement on Fire Insurance, p. 478, where the author says: 'Where the insurance is not sufficient to cover the mortgage debt, the company takes nothing by subrogation and assignment until the mortgage is paid or tendered in full ,both principal and interest.'

> "However, the trial court did not deny the motion to subrogate, but simply held the matter in abeyance until such time as the company would make or tender payment of said judgment in full, at which time it reserves the right to take up and decide the said question."

The trial judge, since the trial of the case, is holding the original notes and mortgage of Mrs. Allen for the purpose of protecting the rights of the defendant below in case it ever signified its willingness to pay up. When the appellant pays the appellee herein the amount due her the court will see that its rights are protected.

CONCLUSION

We submit that the decision of the trial court should be affirmed. We also suggest that the penalty provided in Rule 30 of this Court should be applied in this case as it seems to us that this appeal has been made for the purpose of delay only.

Respectfully submitted,

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No. 5983

United States

Circuit Court of Appeals

For the Ninth Circuit.

LEE HOW PING.

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco.

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

FILED
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PAUL P. O'BRIEN,
CLERK

Filmer Bros Co Print 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

GEORGE A. McGOWAN, Esq., 550 Montgomery St., San Francisco, Cal.,
Attorney for Appellant.

UNITED STATES ATTORNEY, San Francisco, Cal.,
Attorney for Respondent.

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 20,111–L.

In the Matter of LEE HOW PINK, Son of a Native, on Habeas Corpus; 28103/4–13 ex SS. "Pr. GRANT," June 26, 1929.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable United States District Judge, Now Presiding in the United States District Court, in and for the Northern District of California, Second Division:

It is respectively shown by the petition of the undersigned, that Lee How Ping, hereafter in this petition referred to as the "detained," is unlawfully imprisoned, detained, confined and restrained of his liberty by John D. Nagle, Commissioner of Immigration for the Port of San Francisco at the

Immigration Station at Angel Island, County of Marin, State of California, Northern District and Southern Division thereof; and that the imprisonment, detention, confinement and restraint are illegal and that illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and alien not subject or entitled to admission into the U. S. under terms and provisions of the Acts of Congress of May 5, 1882; July 5, 1884; Nov. 3, 1893, and April 29, 1902; as amended and re-enacted by Section 5 of the Deficiency Act of April 7, 1904, which said acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and the Immigration Act of 1924; and that he, the said Commissioner intends to deport the said detained away from and out of the United States to the Republic of China, by direction of the Secretary of Labor, who has just dismissed the appeal in said case. [1*]

That the Commissioner claims that the said detained arrived at the port of San Francisco on or about the 26th day of June, 1929, and thereupon made application to enter the U. S. as a son of a native thereof, and that the application of the said retained was denied by the Commissioner of Immigration and a Board of Special Inquiry, and that an appeal was thereupon taken from the excluding decision of the said Commissioner of Im-

*Page-number appearing at the foot of page of original certified Transcript of Record.

migration and the said Board of Special Inquiry to the Secretary of Labor and that the said Secretary thereafter dismissed the said appeal; that it is claimed by the said Commissioner that in all of the proceedings had herein the said detained was accorded a full and fair hearing; that the action of the said Commissioner and the said Board of Special Inquiry and the said Secretary was taken and made by them in the proper exercise of the discretion committed to them by the statute, and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner alleges, upon his information and belief, that the hearing and proceedings had herein, and of the said Board of Special Inquiry, and the action of the said Secretary was and is in excess of the authority committed to them by the said rules and regulations and by said statutes, and that the denial of the said application of the said detained to enter the U. S. as the son of a native-born citizen thereof was and is an abuse of the authority committed to them by the said statutes in each of the particulars hereinafter set forth, and that there is not sufficient evidence to sustain the said adverse action of the said Board of Special Inquiry and the said Secretary of Labor in denying the application in said case:

I.

Your petitioner alleges, upon his information and belief, that the evidence presented before the said Commissioner, and the said [2] Board of

Special Inquiry, and the said Secretary, upon application of the said detained to enter the United States; showing that the father of the said detained, Lee On, was a resident of the Sar Hing Gong Village, Sun Ning District, China; that the applicant's father, Lee On, his P. L. brother, Lee Fong, together with their prior landing files, and the applicant were all examined covering a wide and multitude of various matters; that the testimony of the said people, before the immigration authorities, shows that they were interrogated substantially as to every conceivable thing that occurred, or would have been likely to have occurred during their lives, or come within their observation, of which each could have been expected to have any knowledge; that the father has mentioned this applicant as his son upon every occasion when testifying before the Immigration authorities during many years last past, giving for him the same name and age consistent with that now given, and he was likewise mentioned by his prior landed brother when testifying before the said Immigration authorities, giving for him the same name and age consistent with that now given; which said evidence is now hereby referred to with the same force and effect as if set forth in full herein, and was of such a conclusive kind and character establishing the American nativity of the father of the said detained, and hence showing the said detained to be the son of a native-born citizen of the United States, and which said evidence was of such a legal weight and sufficiency that it was an abuse

of discretion on the part of the said Commissioner and the said Board, and the said Secretary to deny the said detained the right of admission into the United States and instead thereof, to refuse to be guided by said evidence; and the said adverse action of the said Commissioner, the said Board, and the said Secretary was, your petitioner alleges, upon his information and belief, arrived at and was done in denying the said detained the fair hearing and consideration [3] of his case to which he was entitled. Said action was done in excess of the discretion committed to the said Secretary and the said Board, and to the said Commissioner of Immigration, and your petitioner alleges upon his information and belief, that the said action of the Secretary and the said Commissioner and the said Board was influenced against the said detained and against his witnesses solely because of his being of the Chinese race, and is seeking admission into the United States upon the ground of being a citizen thereof. That your petitioner is unable to present or file herewith a copy of the said Immigration record.

It is conceded by the said Board of Special Inquiry that the said father, your petitioner herein, Lee On, and his wife and other children are now domiciled within the United States; it is admitted that he was in China at a time to make possible his paternity of the applicant; it is further admitted that upon his return from this trip during June, 1915, he gave the birth date for his second son in exact agreement with that now claimed for

this applicant; it is further admitted that there is a marked physical resemblance between the applicant and the said detained and your petitioner, his father, Lee On, and that the demeanor of all the witnesses was splendid; and that, notwithstanding this, there is no evidence contained in said record sufficient to justify the immigration officers in setting aside and disregarding and holding as naught, the evidence upon behalf of the said detained.

Your affiant not having the record in his possession for the *enlightment* of the Court, he hereunto annexes a copy of the brief filed by H. H. North, of the Washington Bar, which is now part and partial of the said Immigration file, as Exhibit "A." The Immigration record is not yet open to our review, but if the same is so open to our review before this petition is filed, it will be filed herewith as Exhibit "B"; if not the same will be filed hereafter. Your affiant will require a report of the Board of Review at Washington and file it later in connection with the petition; same not now being in the jurisdiction of this court. [4]

It is conceded that the applicant speaks the dialect of the village from which he comes in China, and that his physical development is such as a person of his age should have.

That it is the intention of the said Commissioner of Immigration to deport the detained out of the United States and away from the land of which he is a citizen by the SS. "Pres. Johnson," sailing from this port on the 4th day of October, 1929, at the hour of 4:00 P. M., and unless this Court inter-

venes to prevent said deportation the said detained will be deprived of residence within the land of his citizenship.

That the said detained is in detention at the Immigration Station in Marin County, at Angel Island, and cannot for said reason verify said petition upon his own behalf; that the said petition is verified by your petitioner herein, at the request of the said detained, and as his next friend, upon his behalf and in his name.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner, commanding and directing him to hold the body of the said detained within the jurisdiction of this court and to present the body of the said detained before this court at a time and place to be specified in said order, together with the time and cause of his detention, so that the same may be inquired into to the end that the said detained may be restored to his liberty and go hence without day.

Dated at San Francisco, Calif., October 3d, 1929.

LEE ON,
Petitioner.

GEO. A. McGOWAN,
Attorney for Detained and Petitioner Herein.

[5]

United States of America,
State of California,
City and County of San Francisco,—ss.

The undersigned, being first duly sworn, deposes and says:

That the affiant herein is the petitioner in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief; and as to those matters he believes to be true.

LEE ON,
Petitioner.

Subscribed and sworn to before me this 3d day of October, 1929.

[Seal] JOHN F. BURNS,
Notary Public, in and for the City and County of San Francisco, State of California. [6]

EXHIBIT "A."

In the Department of Labor, Bureau of Immigration.

MANIFEST No. 28103/4–13.

In Re: Application of LEE HOW PING, Son of a Native.

BRIEF ON BEHALF OF APPLICANT.

Applicant, a Chinese boy of less than 15 years of

age, born in China, seeks landing as the son of LEE ON, a native citizen of the United States of America, of the Chinese race.

It is admitted that the father is a native citizen. It is admitted that he has made three trips to China and that each time he has been admitted as a citizen. It is admitted that he and his wife and other children are now domiciled in the United States. It is admitted that he was in China at a time to make his paternity of the applicant possible. It is further admitted that upon his return from this trip during June, 1915, he gave the name and birthdate for his second son in agreement with that claimed now for this applicant and it is admitted by the entire Board of Special Inquiry that there is a marked physical resemblance between applicant and his father, LEE ON. Further, the uncontradicted records of the Immigration Service show as follows:

That applicant's paternal grandmother, father, brother, sister, stepmother and two half-brothers and one half-sister have had their right to legal residence here favorably determined by the United States authorities at various and sundry times and that there is nothing in the records tending to show any of them other than creditable witnesses.

That on examination LEE ON, the father, claimed applicant as his son in June, 1915, December, 1920, January, 1921, November, 1922, April and November, 1928, and at the present hearing; applicant's uncle, LEE POY, also a citizen of the United States of America, testified in December,

1927, that LEE HO SING is the second son of his brother, LEE ON, LEE POY'S son, LEE SING, gave similar testimony in November, 1928; LEE ON'S eldest son, LEE FONG, claimed applicant as his brother in November, 1922, and claims him now; Lee On's wife, Wong Shee, during November, 1922, and during April, 1928, testified that Lee How Ping was her husband's second son by his previous marriage, and in April, 1928, a returning Chinese merchant from the same town in China, Wong Suey Quong, by name, testified that he had met Lee How Ping, son of Lee On, and knew him as such, at his home town, Soo Hing Gong Village, China.

Certainly this is an unusual and most convincing record.

No attempt was made to show that any of the witnesses were of bad character or that any of them had made at other times statements inconsistent with the present testimony. (C. C. P. 2052.) On the other hand, the Board expressly states on page 30 of record: "The demeanor of the witnesses while testifying was satisfactory."

The direct evidence of several witnesses who are entitled to full credit has been produced. (C. C. P. 1844.)

They are presumed to speak the truth and there is nothing whatever in the record to overcome that presumption (C. C. P. 1847).

None but a material allegation need be proved and the only material matter is the paternity of applicant. (C. C. P. 1867.) [7]

Inquiry into collateral facts has been indulged in to an extreme degree and every disagreement, no matter on how immaterial a subject, has been seized as a pretext for denial of the main issue. (C. C. P. 1868.)

Brother Lee Fong was asked how many baskets were used at marketing, where he had his hair cut, did he use a razor, a strop or shaving cream, did he have a soap brush, did he use powder after shaving, and where did he keep his shaving appliances. And applicant was asked such questions as: "How often does your brother shave?" "Did you ever see him with a growth of whiskers for a day or two?" Q. "This questioning you have just been taken over is intimate with your home life in China. Now, why don't you know something about it?" To which applicant very justly answered: "I thought the matter of shaving was of no importance so I never paid any attention to it."

Also, Q. "Who installed the tile floors in that house?" and "Do you know where they came from?"

And the brother, Lee Fong, was asked, "You stated yesterday that you visited the graves of your ancestors on two occasions while you were last in China. When did you make your second visit to the graves."

Gross attempts were made to mislead the witnesses such as the following to the brother, Lee Fong: "Has no one ever advised him (the applicant) of his close association with you when a small boy? A. I do not know if anybody ever ad-

vised him or not. Q. Such an event common between you, why would you not mention it? A. No, because I did not think it was important. Q. The question of its importance in that you and he claim to be brothers and conversations brothers would have related to incidents at school." Was such an examination ever permitted outside of a police court?

ANALYZE ALLEGED DISCREPANCIES.

When this boy of less than fifteen years of age was first brought before the examining board after being kept in confinement from June 26 to August 15, 1929, the record shows that he was put at ease in the following manner: (See page 1 of record.) Applicant. Admonished that if at any time he fails to understand the interpreter to immediately so state; also advised as to the nature of and the penalty for the crime of perjury.

Applicant and the witnesses were examined at length and in great detail in regard to the occupants of various houses in the village and diagrams were drawn by applicant and his brother which are remarkable for their accuracy. (Exhibit "B.")

Judge Rudkin said in the recent decision in the case of Wong Tsick Wye et al. vs. Nagle, etc., U. S. C. C. of A., 9th District, 33 (2d) Fed. 226, June 24, 1929, after setting forth in detail the discrepancies upon which the applicants had been denied a landing:

> "It seems to us that whatever discrepancies are found in this testimony are unimportant,

considering the scope of the examination when compared with the innumerable particulars in which the witnesses are in full accord.

and quotes with approval the following decisions:

"We may say at the outstart that discrepancies in testimony, even as to collateral and immaterial matters, may be such as to raise a doubt as to the credibility of the witnesses and warrant exclusion; but this cannot be said of every discrepancy that may arise. We do not all observe the same things, or recall them in the same way, and an American citizen cannot be excluded, or denied the right of entry, because of immaterial and unimportant discrepancies in testimony covering a multitude of subjects. The purpose of the hearing is [8] to inquore into the citizenship of the applicant, not to develop discrepancies which may support an order of exclusion, regardless of the question of citizenship."

In Nagle vs. Wong Ngook Hong, 27 F. (2d) 650, we said:

"Owing to the wide range of the examination of the several witnesses, repetition, and minute detail, the records are voluminous. Certain discrepancies are relied upon by the Commissioner, but we agree with the lower court that they are either only apparent or insignificant. No group of witnesses, however intelligent, honest, and disinterested, could

submit to the interrogation to which these witnesses were subject without developing some discrepancies."

Again, in Nagle vs. Dong Ming, 26 F. (2d) 438, we said:

"But it must be borne in mind that mere discrepancies do not necessarily discredit testimony. It is sometimes urged upon us that the testimony is impeached by its discrepancies, and sometimes by its complete accord. Both propositions are valid. But to be so, and to escape the charge of inconsistency, they must be understood in the light of the reason upon which they rest, and applied only within the range of such reason; otherwise, all testimony would be self-impeaching."

In Mason ex rel. Lee Wing You vs. Tillinghast, (C. C. A.) 27 F. (2d) 580, the Court said:

"So proceeding, the immigration tribunals succeeded in developing some very slight discrepancies on matters purely collateral, on which they ground their finding that the relationship is not reasonably established. But this euphemistic phrase must not be allowed to disguise the real situation. There is here

no room for honest error. The family exists as the three witnesses described it, unless the record as a whole furnished some basis upon which reasonable, truth-seeking minds can ground a conclusion of fraud and perjury on the part of all three witnesses. There is no conflicting evidence, direct or indirect, on the question of relationship. As noted above, the three witnesses were in absolute agreement on the vital issue of relationship and as to who the family are. We assume that these tribunals are not bound by the rules of evidence applicable in a jury trial. But they are bound by the rules of reason and logic—by what is commonly referred to as common sense."

See, also, Fong Tan Jew ex rel. Chin Hong Fun vs. Tillinghast, (C. C. A.) 24 F. (2d) 632.

"As said by this court in the Go Lun case, a reading of the entire record leaves not the slightest room for doubt that the relationship was fully established and that the appellants are citizens of the United States. A contrary conclusion is arbitrary and capricious, and without any support in the testimony. The judgment of the court below is therefore re-

versed, with directions to issue the writ of habeas corpus as prayed."

Go Lun vs. Nagle, 22 F. (2d) 246.

The alleged discrepancies in this case are so trivial as not to warrant further comment; in fact, we are unable to find anything that can be called a conflict between the testimony of father and son, and we wonder that the board should so consider them. [9]

Counsel, who have in the past, as Government officers, examined hundreds of records in Chinese cases, are of the opinion there is no question whatever but that this is a meritorious case and one which should receive favorable action at the earliest possible moment. It is, in our opinion, an even stronger case than that of Wong Tsick Wye et al., above quoted as having been favorably decided in June last by the United States Circuit Court of Appeals here.

As a further evidence of our good faith and notwithstanding the fact the veracity of Lee On, the applicant's father, has not been attacked, we make an affirmative offering of an affidavit in support of said Lee On's honesty, and integrity, made by an American citizen who has known him for more than thirty years and since his boyhood. Mrs. Abadie has been a lifelong resident of Berkeley and is a woman of the highest repute.

Respectfully submitted,

(Sgd.) H. H. NORTH,

Atty. for Applicant. [10]

EXHIBIT "B."

28102/4–13.

In the Matter of LEE HOW PING, Son of a Native.

SUMMARY.

8/17/29.

BY CHAIRMAN: This applicant is applying for admission as the son of LEE ON, native. LEE ON has made three trips to China and upon his return from each of these trips was re-admitted as a native. He departed on the essential trip making possible his paternity to a child of the age given for the present applicant, Oct. 1, 1913, and returned June 21, 1915, at which time he gave the name and birth date for his second son in agreement with that now claimed for this applicant. When the al. father returned from China on his last trip, Nov. 15, 1922, he was accompanied by his second wife, two daughters and an al. son, LEE FONG, all of whom were admitted Nov. 24, 1922.

Statements on relationship have been taken from the al. father, LEE FONG, and the applicant. It should be noted at this time that LEE FONG departed from this port Oct. 15, 1927, and returned June 26, 1929, in company with the applicant. It should also be noted that an al. paternal uncle of the applicant, LEE POY, departed for China on Jan. 6, 1928, and returned Oct. 3, 1928, in company with an al. son, LEE SING,

who was admitted Nov. 20, 1928. At the time of LEE FONG'S departure for China, Oct. 15, 1927, he was accompanied by his stepmother and two half brothers, LEE JING LEUNG, and GEORGE LEE. These latter persons returned to the U. S. April 5, 1928. The following discrepancies have developed:

When LEE FONG was an applicant for admission in 1922, LEE ON—the al. father testifying at that time, stated on page 2 that his son, LEE HO PANG (LEE HOW PANG, the applicant), was being taken care of by MAR SHEE, his brother, LEE POY'S wife; that she did not live in the same house with him but in the same village; that his son, LEE FONG, was attending school for five years at that time and that his son, LEE HO PANG, the applicant, started to attend school last year. LEE FONG testified on page 8 of that examination that his brother, the applicant, was living with his aunt, his uncle's wife, and on page 9, when asked, "What were you doing at home?" A. Attending school in the home village." Q. How long? A. Five years. Q. How long did your brother, LEE HO PANG, go to school? A. Two years including the present year.

The al. paternal uncle testifying on behalf of LEE SING (file 27285/5–27) stated on page 7 that the applicant in the present case, LEE HO PANG, lived and ate in his house until his brother and stepmother returned home in the 10th month of last year and then he returned to his own home where he lived with his brother, LEE FONG.

LEE SING, al. cousin of applicant, testifying in his own behalf, on page 15, file 27285/5–27, stated that his uncle, LEE ON'S first wife died in CR. 5 (1916), that LEE ON was married the second time to WONG SHEE, CR. 10 (1921), and when questioned regarding the present applicant stated that "He came to live with us right after his mother's death in CR. 5 (1916) * * * * then he returned to his own house when his father remarried in CR. 10 (1921)" and on page 18, LEE SING testified that the present applicant was attending school in the home village and that he attended school with him when he was smaller but he did not remember for how many years. [11]

In the present examination the al. father testified, on page 6, that the applicant was attending school in the home village about a year and nine months before the al. father left the SAR HING GONG Village to return to the U. S., and that the applicant started school at the age of eight; that his son, LEE FONG, and his nephew, LEE SING, also attended school with the applicant at that time. The al. father also stated that after he came to the U. S. in CR. 11 (1922) the applicant lived in the house of his brother, LEE POY, in the same village.

LEE FONG, the pl. brother, stated on page 11, that after his mother's death, he and the applicant lived in his uncle's house in the SAR HING GONG VILLAGE and that he slept in that house from the time of his mother's death up to the time his father last arrived in China (1922). He also stated on

page 9 that LEE SING attended school with him and the applicant, and on recall, page 24, stated that he and the applicant were attending school together before 1922, that they both lived in his uncle, LEE POY'S house, after his mother's death occupying the room on the small door side.

The applicant stated on page 16 that he started school at the age of eight and when questioned, "How many years did you and LEE FONG attend school together?" he answered, "I do not remember that I ever attended school with him." On page 17, he stated that he did not remember of ever having attended school with his cousin, LEE SING. The applicant stated on page 19 that after his mother's death he went to live with his uncle's wife, that he was living in her house when his father came home in CR. 10 (1921), that he does not remember where his brother, LEE FONG, was living at that time; that he does not remember his brother, LEE FONG, ever having lived in the same house with him before CR. 10 (1921); that he has no knowledge of his brother, LEE FONG, ever having lived in his uncle, LEE POY'S house, making the reply—"No, I do not remember anything about that at all."

On page 9, the al. brother in giving the hours of school while he and the applicant attended together stated—"We started to school at seven o'clock in the morning and returned home for breakfast about nine o'clock in the morning and after breakfast we returned to school and remained there until four o'clock in the afternoon. At four o'clock we re-

turned home for supper, after which we returned *go* school again and remained at school until seven o'clock in the evening."

The applicant giving the school hours, that they were from 8 A. M. to 4 P. M., that he returned home for breakfast a little after nine, that he returned home at four o'clock because school was out at that time, never returning to the school at any time after four o'clock in the afternoon.

The applicant and his al. brother LEE FONG, have submitted diagrams marked Exhibits "A" and "B" of the SAR HING GONG VILLAGE and the locations of the dwelling-houses and public building are in agreement. However, the following discrepancies have developed relative to the occupants of houses concerning which both the applicant and LEE FONG were questioned:

The applicant stated, page 20, and indicates same on his diagram, Exhibit ," that LEE WAH NAI'S wife, two sons and one daughter lived in the 1st space, 2d row from the south, LEE WAH NAI having gone to a foreign country and that LEE WAH NAI did not live in that house while his brother, LEE FONG, was last in China. He stated on recall, page 25, when asked when LEE WAH NAI went abroad that as far as he knows he has never seen him and that he did not see LEE WAH NAI at the SAR HING GONG VILLAGE while LEE FONG was last in China.

LEE FONG stated and indicated on his diagram, Exhibit ," that LEE WAH NAI himself, his wife, two sons and one daughter were living in the

1st space, 2d row from the south (page 11) and on recall stated on page 24 that LEE WAH NAI was living ~~relative~~ at the time he arrived home but died about a month afterwards, relative to the death of LEE WAI NAI the applicant states on page 25 and page 26 that no deaths occurred in the SAR HING GONG VILLAGE while his brother was last in China nor did anyone die in LEE WAH NAI'S house. [12]

The applicant stated on page 20 and indicated on Exhibit "B" the second house, third row, or the house in back of his was occupied by LEE YEN NAI'S wife and two sons while his brother ~~occupied~~ was last in China, that LEE YEN NAI had gone to a foreign country. He stated on page 25 that he did not know when LEE YEN NAI went abroad, that he did not see LEE YEN NAI in the SAR HING GONG VILLAGE while his brother, LEE FONG, was last in China.

LEE FONG testified and indicated on Exhibit "A" that LEE YEN NAI, his wife and sons occupied the second house, third row while he was last in China and on recall stated on page 24 that he saw LEE YEN NAI in the SAR HING GONG VILLAGE frequently while he was last in China, every day. When confronted with the fact that his testimony regarding LEE WAH NAI and LEE YEN NAI was in serious disagreement with the applicant, the p.l. brother—LEE FONG, stated on page 25, "I know that WAH NAI is dead. YEN NAI was there and I saw him often."

The demeanor of the witnesses while testifying was satisfactory. The members of the board have expressed their opinions on page 26 of the resemblance to be found between the al. father, the applicant and p.l. al. brother.

The discrepancies above enumerated are so great that they cast a grave doubt upon the claimed relationship in this case and after a careful consideration of all the testimony adduced it is my opinion that the burden of proof has not been sustained nor the claimed relationship reasonably established and I therefore move that the applicant be denied admission to the U. S. and deported to China, the country whence he came.

By Member LINWOOD.—I second the motion.

By Member MORRIS.—I concur.

[Endorsed]: Filed Oct. 4, 1929. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [13]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Good cause appearing therefor, and upon reading the verified petition on file herein:

IT IS HEREBY ORDERED that John D. Nagle, Commissioner of Immigration for the port of San Francisco, appear before this court on the 21st day of October, 1929, at the hour of 10:00 A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not issue herein, as

prayed for, and that a copy of this order be served upon the Commissioner, and copy of petition and order be served upon the U. S. Attorney for this District, his representative herein.

AND IT IS FURTHER ORDERED that the said John D. Nagle, Commissioner of Immigration, as aforesaid, or whoever, acting under the orders of the said Commissioner, or the Secretary of Labor, shall have the custody of the said Lee How Ping, or the master of any steamer upon which he may have been placed for deportation by the said Commissioner, are hereby ordered and directed to retain the said Lee How Ping within the jurisdiction of this court until its further order herein.

AND IT IS FURTHER ORDERED that the said John D. Nagle, Commissioner of Immigration, present at said time, the immigration records of the Department of Labor bearing upon said case, for the enlightment of the Court and comply with Section 23 of Immigration Act of 1924.

Dated at San Francisco, October 4th, 1929.

HAROLD LOUDERBACK,
U. S. District Judge.

[Endorsed]: Filed Oct. 4, 1929. [14]

[Title of Court and Cause.]

APPEARANCE OF RESPONDENT AND NOTICE OF FILING EXCERPTS OF TESTIMONY FROM THE ORIGINAL IMMIGRATION RECORD.

To the Petitioner in the Above-entitled Matter, and to Geo. A. McGowan, Esq., His Attorney:

PLEASE TAKE NOTICE that the respondent hereby appears in the above-entitled matter, and will upon the hearing on the order to show cause rely upon certain excerpts of testimony from the original immigration record additional to the portions of such records which are set out in the petition for a writ of habeas corpus herein, a copy of such additional excerpts being annexed hereto. Please examine same prior to the hearing on the order to show cause.

Dated:

GEO. J. HATFIELD,
United States Attorney,
(Attorney for Respondent.) [15]

[Title of Court and Cause.]

RESPONDENT'S MEMORANDUM OF EXCERPTS OF TESTIMONY FROM THE ORIGINAL IMMIGRATION RECORD.

The witnesses herein are:

LEE HOW PING, the applicant, born August 16, 1914, never in the United States.

LEE ON, alleged father of the applicant, native of the United States, age 46, in China from December, 1908, to September, 1910, from October, 1913, to June, 1915, and from January, 1921, to November, 1922.

LEE FONG, alleged brother of the applicant, born April 18, 1911, first came to the United States November 15, 1922, and was back in China from October, 1927, to June, 1929.

Lack of satisfactory proof of relationship of the applicant to his alleged father is the ground for the exclusion decision of the executive department. We quote below, from the original immigration record, some of the conflicting testimony. [16]

I.

LEE ON testified on August 15, 1929, as follows:

"Q. Describe your first wife.

A. GIN SHEE died in CR. 5–5 (June, 1916) at the SAR HENG GONG VILLAGE. S. N. D. China." (Immig. Record 55701/444, p. 13.)

and on August 16, 1929, as follows:

"Q. Where did your son, LEE FONG, live after your wife, GIN SHEE died?

A. In his aunt's house, the wife of my elder brother.

By CHAIRMAN.—Q. Did this applicant live in the same house with LEE FONG at that time?

A. Yes.

Q. How old was this applicant when his mother died?

A. Two years old, Chinese reckoning.

Q. How old was this applicant when you returned to China on your last trip?

A. About eight years old.

Q. Then the applicant lived in the same house with your son, LEE FONG, for about six years, is that correct?

A. Yes, just about." (Id., p. 32.)

LEE FONG testified on August 16, 1929, as follows:

"Q. Where did you and this applicant live in the SAR GONG Village after your mother's death?

A. In my uncle's house in the SAR HING GONG Village.

Q. Did you continue to live in your uncle's house until you came to the U. S. in CR. 11 (1922)?

A. No, I slept at our house when my father returned home on his last trip. I slept in my uncle's house from the time of my mother's death up to the time of my father's arrival on his last trip." (Id., p. 21.)

and on August 17, 1929, as follows:

"Q. Did you and the applicant live together in your uncle, LEE POY'S house after your mother's death? A. Yes.

Q. Where did you and the applicant sleep in LEE POY'S house?

A. We lived in a room on the small door side." (Id., p. 34.) [17]

LEE HOW PING testified on August 16, 1929, as follows:

"Q. Where did you and your brother LEE FONG live in the SAR HING GONG Village after your mother's death?

A. I went to live with my uncle's wife. I do not remember about my brother, LEE FONG.

Q. Where were you living when your father came home in CR. -10 (1921)?

A. In my aunt's house.

Q. Where was your brother, LEE FONG, living at that time? A. I do not remember.

Q. Do you remember your brother, LEE FONG, and yourself living in the same house?

A. No, I do not remember that.

* * * Q. Have you any knowledge of your brother, LEE FONG, ever having lived in your uncle's LEE POY'S house?

A. No, I do not remember anything about that at all." (Id., pp. 29–30.)

and on August 17, 1929, as follows:

"Q. Did you ever hear that your brother, LEE FONG, ever lived in your uncle Lee Poy's house with you?

A. I do not remember and I have never been told of it." (Id., p. 36.)

II.

LEE ON testified on November 24, 1922, as follows:

"Q. When did you return from your last trip to China?

A. On the last 'President Lincoln' (Nov. 15, 1922). (Immig. Record 28103/4–12, p. 19.)

Q. Did your son, Lee Fong, go to school at any time? A. Yes.

Q. How long has he been in school?

A. Five years.

Q. Has your son, LEE HO PONG, ever been in school?

A. Yes.

Q. How many years?

A. He started to go to school last year." (Id., p. 17.)

and on August 15, 1929, as follows:

"Q. What was this applicant doing in China when you were last there?

A. Attending school in the home village.

Q. At what age did the applicant start to attend school? A. Eight. [18]

Q. How long had he been attending school before you left the SAR HING GONG Village to return to the U. S.?

A. A little over a year. About a year and nine months.

Q. Was your son, LEE FONG, also attending school with the applicant at that time?

A. Yes.

Q. Was your nephew, LEE SING, attending school with LEE FONG and the applicant at that time?

A. Yes. (Immig. Record 55701/444, p. 16.)

LEE FONG testified on November 24, 1922, as follows:

"Q. What were you doing at home?

A. Attending school in the home village.

Q. How long?

A. Five years.

Q. How long did your brother, Lee Ho Pang, go to school?

A. Two years, including the present year." (Immig. Record 28103/4–12, p. 11.)

and on August 16, 1929, as follows:

"Q. At what age did this applicant start school?

A. At the age of eight.

Q. How old were you when you started school?

A. Eight years old.

Q. How many years did you and this applicant attend school together?

A. One or two years. (Immig. Record 55701/444, pp. 18–19.)

Q. Does your uncle, LEE POY, have any children?

A. Three sons, no daughters.

Q. What are their names, ages and whereabouts?

A. LEE SING, aged 20, now in the U. S.

* * *

Q. Did LEE SING attend school with you and the applicant?

A. Yes." (Id., p. 19.)

and on August 17, 1929, as follows:

"Q. How old was this applicant when you first came to the U. S. in CR. 11 (1922)?

A. He was eight or nine years old.

Q. Had the applicant started to attend school before CR. 11 (1922)?

A. Yes.

Q. Were you and the applicant attending school together before CR. 11 (1922)?

A. Yes." (Id., p. 34.)

On November 20, 1928, LEE SING who is claimed to be a cousin of the applicant, Lee How Ping, testified as follows: [19]

"Q. What was LEE HO PING doing in China, when you and your father last left there to come to this country?

A. He was attending school in the home village.

Q. Did you ever attend the home village school with your cousin, LEE HO PING?

A. Yes, when I was smaller.

Q. How many years did you and LEE HO PING attend the home village school together?

A. I don't remember for how many years." (Immig. Record 27285/5–27, p. 26.)

LEE HOW PING testified on August 16, 1929, as follows:

"Q. At what age did you start school?

A. At the age of eight.

Q. How many years did you and LEE FONG attend school together?

A. I do not remember that I ever attended school with him.

Q. Do you remember ever having attended school with your cousin, LEE SING?

A. I do not remember that.

Q. How old were you when your brother, LEE FONG, first came to the U. S.?

A. Eight or nine years old.

Q. Did your brother, LEE FONG, attend school with you before he first came to the U. S.

A. No.

Q. What was LEE FONG doing before he first came to the U. S. in CR. 11 (1922).

A. I do not remember because it has been so long ago.

Q. In what year did you start to attend school?

A. Either CR. 9 or CR. 10 (1920 or 1921).

Q. How old was LEE FONG in CR. 11 (1922)?

A. About 12 or 13.

Q. Well, how is it you started to attend school in CR. 9 or 10 (1920 or 1921), when you were eight years old, and LEE FONG was 12 or 13 years old when he first came to the U. S. and you do not remember ever having attended school with LEE FONG?

A. I do not remember whether or not I ever attended school with my elder brother.

Q. According to the age you have given when you first started to attend school and the age LEE FONG has given for the time when he first started to attend school, you and LEE FONG must have attended school at the same time? If such is the fact, why do you not know about it?

A. I may have attended school with him, but I was then only a small boy and that is so long ago that I do not remember it.

Q. When did LEE FONG quit school?

A. I do not remember, I suppose he quit school [20] at the time he left for this country.

Q. How old were you when LEE FONG first came to the U. S.?

A. Eight or nine years old. * * *

Q. What were the school hours in the SAR HING GONG Village?

A. From 8 A. M. to 4 P. M.

Q. What time did you return home for breakfast? A. A little after nine.

Q. Did you return to the school at any time after 4 o'clock in the afternoon?

A. No.

Q. Why did you return home at four o'clock?

A. School was out at that time,"

(Immig. Record 55701/444, pp. 26–27.)

III.

LEE FONG testified on August 16, 1929, as follows:

"Q. How many trips have you made to China since you first came to the U. S.?

A. One trip only.

Q. Describe that trip.

A. Departed CR. 16–9 (Oct., 1927) and returned C. R. 18–5 (June, 1929). (Id., pp. 17–18.)

"Q. How large is the SAR HING GONG Village?

A. It has 12 dwellings and one schoolhouse.

* * *

Q. Where is your father's house in the SAR HING GONG Village?

A. The first house, third row, from the head or south. (Id., p. 21.)

"Q. Who lives in the house on the first space, second row, from the south?

A. LEE WAH NAI (Lee Wah Nai).

Q. Name all the persons who were living in that house when you were last in China.

A. WAH NAI himself, his wife, two sons and one daughter." (Id., p. 21.)

And on August 17, 1929, as follows:

"Q. Was LEE WAH NAI living in the 1st house, 2d row, from the south, when you were last in China?

A. He was living at the time I arrived home. He died about a month afterward.

Q. Why did you state that WAH NAI himself was living in that house when you were last in China,

A. Yes, he was living there when I first arrived." (Id., p. 34.) [21]

LEE HOW PING testified on August 16, 1929, as follows:

"Q. Who lives in the house in the 1st space, 2d row, from the south?

A. LEE WAH NAI.

Q. Name all the persons who were living in that house when your brother LEE FONG, was last in China?

A. His wife, two sons and one daughter, LEE WAH NAI having gone to a foreign country.

Q. Do you mean by that that LEE WAH NAI did not live in that house while your brother was last in China?

A. Yes. (Id., p. 30.)

and on August 17, 1929, as follows:

"Q. You stated yesterday that LEE WAH NAI, whose family occupies the 1st house, 2d row from the south, had gone abroad. When did LEE WAH NAI go abroad?

A. As far as I know I have never seen him. I only heard from his children that he is abroad.

Q. Your statement on this point does not agree with your al. brother's statement, LEE FONG.

A. I might have seen him in China but I was so young I may not remember.

Q. Did you see LEE WAH NAI at the SAR HING GONG Village while your brother LEE FONG was last in China?

A. No. (Id., p. 35.)

"Q. Were there any deaths in the SAR HING GONG Village while your brother, LEE FONG was last in China? A. No.

Q. (Indicating on Exhibit 'B,' LEE WAH NAI'S house.) Did anyone die in that house while your brother, LEE FONG, was last in China? A. No. * * *

Q. Were there any funerals held in your village while your brother, LEE FONG, was last in China? A. No.

Q. If there had been anyone who died or any funerals held in your village would you know it? A. Yes.

Q. Did anyone die and was buried at any time within your remembrance?

A. No, not since I could understand anything." (Id., pp. 35, 36.) [22]

IV.

LEE FONG testified on August 16, 1929, as follows:

"Q. Who was living in the second house, third row, or the house in back of yours when you were last in China? A. LEE YEN NAI.

Q. Name all the persons who were living in that house during that time.

A. LEE YEN NAI, his wife, and his son." (Id., p. 22.)

"Q. Was LEE YEN NAI living in the 2d house, 3d row, or the house in back of yours, when you were last in China? A. Yes.

Q. Did you see LEE YEN NAI in the SAR HING GONG Village frequently while you were last in China? A. Yes.

Q. Did you see him every day? A. Yes. (Id., p. 34.)

Q. Your testimony regarding LEE WAH NAI, LEE YEN NAI and LEE BOW NAI is in serious disagreement with your brother, the applicant.

A. I know that WAH NAI is dead, YEN NAI was there and I saw him often." (Id., p. 35.)

LEE HOW PING testified on August 16, 1929, as follows:

"Q. Name all the persons who were living in the 2d house, 3d row, or the house in back of yours, when your brother, LEE FONG, was last in China.

A. LEE YEN NAI'S wife and his two sons. LEE YEN NAI has gone to a foreign country. * * *

Q. Do you mean by that that LEE YEN NAI did not live in that house while your brother, LEE FONG, was last in China?

A. Yes, that is what I meant." (Id., pp. 30, 31.)

and on August 17, 1929, as follows:

"Q. You also stated that LEE YEN NAI, whose family occupies the 2d house, 3d row, or the house in back of yours was living abroad. When did LEE YEN NAI go abroad?

A. I do not know.

Q. Did you see LEE YEN NAI in the SAR HING GONG Village while your brother, LEE FONG, was last in China?

A. No." (Id., p. 35.) [23]

V.

LEE FONG testified on August 16, 1929, as follows:

Q. What were the hours of school while you and the applicant attended together?

A. We started to school at seven o'clock in the morning and returned home for breakfast about nine o'clock in the morning and after breakfast we returned to school and remained there until four o'clock in the afternoon. At four o'clock we returned home for supper, after which we returned to school again and remained at school until seven o'clock in the evening. (Id., p. 19.)

LEE HOW PING testified on August 16, 1929, as follows:

"Q. What were the school hours in the SAR HING GONG Village?

A. From 8 A. M. to 4 P. M.

Q. What time did you return home for breakfast? A. A little after nine.

Q. Did you return to the school at any time after 4 o'clock in the afternoon? A. No.

Q. Why did you return home at four o'clock?

A. School was out at that time." (Id., p. 27.)

GEO. J. HATFIELD,
United States Attorney,
(Attorney for Respondent.)

[Endorsed]: Service of the within —— by copy admitted this 14 day of Oct., 1929.

GEO. A. McGOWAN,
Attorney for Petitioner.

Filed Nov. 4, 1929. [24]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 4th day of November, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable HAROLD LOUDERBACK, District Judge.

[Title of Cause.]

MINUTES OF COURT—NOVEMBER 4, 1929—ORDER SUBMITTING ORDER TO SHOW CAUSE.

This matter came on regularly this day for hearing on order to show cause as to the issuance of a writ of habeas corpus herein, whereupon the Court ordered that said matter be and the same is hereby submitted. [25]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 6th day of November, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable HAROLD LOUDERBACK, District Judge.

[Title of Cause.]

MINUTES OF COURT—NOVEMBER 6, 1929—ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS.

The petition for writ of habeas corpus, having been heretofore argued and submitted, and due consideration having been thereon had, IT IS ORDERED that the petition for writ of habeas corpus be and same is hereby denied. [26]

[Title of Court and Cause.]

PETITION ON APPEAL.

To the Honorable HAROLD LOUDERBACK, Judge of the District Court of the United States, in and for the Northern District of California.

Comes now Geo. A. McGowan, Esq., attorney for the petitioners herein, and presents that they feel

aggrieved at the order and judgment made, given and entered in the above-entitled case, on the 6th day of November, 1929; wherein the petitioners were denied a writ of habeas corpus and the proceeding dismissed, and does hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reason set forth in the assignment of errors filed herewith.

WHEREFORE, petitioners prays that their appeal be allowed and citation be issued, as provided by law, and that a transcript of record, proceedings and papers in the above-entitled cause, upon which the said order and judgment were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules and said count and in accordance with the law in such cases made and provided.

Dated at San Francisco, California, this 8th day of Nov., 1929.

GEO. A. McGOWAN,
Attorney for Petitioner. [27]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now Geo. A. McGowan, Esq., attorney for the petitioners herein, and the appellant in the appeal to the United States Circuit Court of Appeals for the Ninth Circuit, taken herein by the said attorney, and files the following assignment of errors, on which he will rely in the proceeding of the said

appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment made, given and entered in this Honorable Court on the ninth day of April, 1929:

(1) That the Court erred in denying the petition for a writ of habeas corpus herein.

(2) That the Court erred in holding that it had no jurisdiction to issue a writ of habeas corpus, as prayed for in petition herein.

(3) That the Court erred in holding that the allegations contained in the petition herein for a writ of habeas corpus and the facts presented upon the issue made and joined herein were insufficient in law to justify the discharge of the petitioners from custody as prayed for in said petition.

(4) That the judgment made and entered herein is contrary to law.

(5) That the judgment made and entered herein is not supported by the evidence.

(6) That the judgment made and entered herein is contrary to the evidence.

WHEREFORE, the appellant prays that the judgment and order of the Southern Division of the United States District Court for the Northern District of California, Second Division, made and entered [28] herein in the office of the Clerk of the said court on the 6th day of November, 1929, denying the petition for a writ of habeas corpus as prayed for in this petition.

Dated at San Francisco, California, this 8th day of Nov., 1929.

GEO. A. McGOWAN,
Atty. for Petitioner and Appellant. [29]

[Title of Court and Cause.]

ORDER ALLOWING PETITION FOR APPEAL.

On this 8th day of November, 1929, come the appellant herein, by their attorney, Geo. A. McGowan, Esq., and having previously filed herein, did present to this court his petition praying for the allowance of an appeal to the Circuit Court of Appeals for the Ninth Circuit, intending to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent and transmitted to the Circuit Court of Appeals, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, and the filing of a cost bond of $250.00, the Court allows the appeal hereby prayed for and orders execution and remand stayed pending the hearing of the said case in the said Circuit Court of Appeals for the Ninth Circuit; and it is further ordered that the respondent herein retain the said detained within the jurisdiction of this court and that he be not de-

ported, or permitted to depart, from the jurisdiction of this court, but remain and abide by whatever judgment may be finally rendered herein.

Dated at San Francisco, Calif., this 8th day of Nov., 1929.

HAROLD LOUDERBACK,
United States District Judge. [30]

[Title of Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS.

It appearing to the Court that the original immigration records appertaining to the application of Lee How Ping, the detained herein, to enter the United States were introduced evidence before and considered by the lower court in reaching its determination herein, and it appearing that said records are a necessary and proper exhibit for the determination of said case upon appeal to the Circuit Court of Appeals,—

IT IS NOW THEREFORE, ORDERED, upon motion of Geo. A. McGowan, Esq., attorney for the detained herein, that the said immigration records may be withdrawn from the office of the Clerk of this court, and filed by the Clerk of this court in the office of the Clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial District, said withdrawal to be made at the time the

record on appeal herein is certified to by the Clerk of this court.

Dated at San Francisco, California, this 8th day of Nov., 1929.

HAROLD LOUDERBACK,
U. S. District Judge. [31]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of Said Court:

Sir: Please make transcript of appeal in the above-entitled case, to be composed of the following papers, to wit:

1. Petition for writ.
2. Order to show cause.
3. Supplemental amendment to petition.
4. Extracts of testimony filed by U. S. Attorney.
5. Minute order introducing immigration record at the hearing in said matter.
6. Judgments and orders denying said petition and dismissing said petition.
7. Petition for appeal.
8. Assignment of errors.
9. Order allowing appeal.
10. Order transmitting original exhibits.
11. Citation on appeal.
12. Clerk's certificate.

Dated at S. F., Calif., Nov. 8th, 1929.

GEO. A. McGOWAN,
Attorney for Petitioner.

[Endorsed]: Service of the within petition for appeal by copy admitted this 8 day of Nov., 1929.

GEO. J. HATFIELD,
Attorney for ————.

Filed Nov. 8, 1929. [32]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 32 pages, numbered from 1 to 32, inclusive, contain a full, true and correct transcript of the records and proceedings in the Matter of Lee How Ping, on Habeas Corpus, No. 20,111, as the same now remain on file of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal in the sum of fourteen dollars and ninety cents ($14.90) and that the same has been paid to me by the attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 13th day of November, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [33]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Hon. JOHN D. NAGLE, Commissioner of Immigration, and to GEO. A. HATFIELD, U. S. Attorney for the Northern District of California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Lee How Ping is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable HAROLD LOUDERBACK, United States District Judge for the Northern District of California, this 8th day of November, A. D. 1929.

HAROLD LOUDERBACK,
United States District Judge.

Service of the within citation on appeal by copy admitted this 8 day of Nov., 1929.

GEO. J. HATFIELD,
Attorney for ————.

[Endorsed]: Citation on Appeal. Filed Nov. 8, 1929. [34]

[Endorsed]: No. 5983. United States Circuit Court of Appeals for the Ninth Circuit. Lee How Ping, Appellant, vs. John D. Nagle, Commissioner of Immigration, Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 13, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5983

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE HOW PING, on habeas corpus,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco,
Appellee.

APPELLANT'S OPENING BRIEF.

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550 Montgomery Street, San Francisco,
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Attorneys for Appellant.

Parker Printing Company, 523 Clay Street, San Francisco

FILED
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No. 5983

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE HOW PING, on habeas corpus,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco,
Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

Appellant was born in China and is of full Chinese blood. He claims to be the son of Lee On, also of Chinese blood, but born in the United States.

Appellant claims the right of American citizenship by virtue of Section 1993 of the Revised Statutes.

The uncontradicted evidence shows that the father is a native citizen; that he has made three trips to China, and upon his return each time has been admitted as a citizen. Applicant's paternal grandmother is a resident of this city and has been for many years; his father lives in San Francisco, as does his step-mother,

brothers and sisters, they having been permitted to land because of the father's citizenship.

Lee On was in China at a time to make the parentage possible, and upon his return from this trip, during June, 1915, he claimed the birth of a son of applicant's age and name; and he has repeated this claim on examinations by the Immigration authorities in December, 1920, January, 1921, November, 1922, and April and November, 1928, and at the present hearing.

Applicant's uncle, Lee Poy, his father's brother, also a citizen of the United States, testified in 1927 that his brother, Lee On, had a son bearing the name of this applicant. His cousin, Lee Sing, Lee Poy's son, gave similar testimony in November, 1928. Lee On's oldest son, applicant's brother, Lee Fong, claimed applicant as his brother in November, 1922, and claims him now.

Lee On's wife, Wong Shee, in November, 1922, and April, 1928, testified that the applicant was her husband's second son by his previous marriage; and in April, 1928, a returning Chinese merchant from applicant's home town in China, Wong Suey Quong by name, testified that he had met Lee How Ping, son of Lee On and knew him as such, at the home town of Sar Hing Gong Village, in China.

Certainly this is an unusual and most convincing record.

In addition, the examining Immigration officers in their summary of the case dated August 17, 1929, find as follows:

> "The demeanor of the witnesses while testifying was satisfactory. The members of the Board have expressed their opinions on page 26 of the resemblance to be found between the alleged father, the applicant and a p. l, alleged brother,"

stating that there is a marked physical resemblance.

It is thus apparent that the applicant's right to land is established by a strong prima facie record. No evidence was introduced by the Government to offset this evidence. But the grounds for rejection were based on certain alleged discrepancies in the testimony as set forth by the Chairman of the Immigration Board of Inquiry in his said summary of 8/17/29, reading as follows:

> "This applicant is applying for admission as the son of Lee On, native. Lee On has made three trips to China and upon his return from each of these trips was readmitted as a native. He departed on the essential trip making possible his paternity to a child of the age given for the present applicant, Oct. 1, 1913, and returned June 21, 1915, at which time he gave the name and birthdate for his second son in agreement with that now claimed for this applicant. When the al. father returned from China on his last trip, Nov. 15, 1922, he was accompanied by his second wife, two daughters and an al. son, Lee Fong, all of whom were admitted Nov. 24, 1922.
>
> Statements on relationship have been taken from the al. father, Lee Fong, and the applicant. It should be noted at this time that Lee Fong departed from this port Oct. 15, 1927, and returned June 26, 1929 in company with the applicant. It should also be noted that an al. paternal uncle of the applicant, Lee Poy, departed for China on Jan. 6, 1928, and returned Oct. 3, 1928, in com-

pany with an al. son, Lee Sing, who was admitted Nov. 20, 1928. At the time of Lee Fong's departure for China, Oct. 15, 1927, he was accompanied by his stepmother and two half brothers, Lee Sing Leung and George Lee. These latter persons returned to the U. S. April 5, 1928. The following discrepancies have developed:

When Lee Fong was an applicant for admission in 1922, Lee On, the al. father testifying at that time, stated on page 2 that his son, Lee Ho Pang (Lee How Ping, the applicant) was being taken care of by Mar Shee, his brother Lee Poy's wife; that she did not live in the same house with him but in the same village; that his son, Lee Fong, was attending school for five years at that time, and that his son Lee Ho Pang, the applicant, started to attend school last year. Lee Fong testified on page 8 of that examination that his brother, the appellant, was living with his aunt, his uncle's wife, and on page 9, when asked 'What were you doing at home?' 'A. Attending school in the same village. Q. How long? A. Five years. Q. How long did your brother, Lee Ho Pang go to school? A. Two years including the present year.'

The alleged paternal uncle testifying on behalf of Lee Sing (file 2728: 5-27) stated on page 7 that the applicant in the present case, Lee Ho Pang, lived and ate in his house until his brother and stepmother returned home in the 10th month of last year and then he returned to his own home where he lived with his brother, Lee Fong.

Lee Sing, al. cousin of applicant, testifying in his own behalf on page 15, file 27285/5-27, stated that his uncle, Lee On's first wife died in CR 5 (1916); that Lee On was married the second time to Wong Shee, CR 10 (1921) and when questioned regarding the present applicant stated that 'He came to live with us right after his mother's death in CR 5 (1916)—then he returned to his

own house when his father remarried in CR 10 (1921)' and on page 18, Lee Sing testified that the present applicant was attending school in the home village and that he attended school with him when he was smaller but he did not remember for how many years.

In the present examination the al. father testified, on page 6, that the applicant was attending school in the home village about a year and nine months before the al. father left the Sar Hing Gong Village to return to the U. S., and that the applicant started school at the age of eight; that his son, Lee Fong, and his nephew, Lee Sing, also attended school with the applicant at that time. The al. father also stated that after he came to the U. S. in CR 11 (1922) the applicant lived in the house of his brother, Lee Poy, in the same village.

Lee Fong, the p.l. brother, stated on page 11, that after his mother's death, he and the applicant lived in his uncle's house in the Sar Hing Gong Village and that he slept in that house from the time of his mother's death up to the time his father last arrived in China (1922). He also stated on page 9, that Lee Sing attended school with him and the applicant, and on recall, page 24, stated that he and the applicant were attending school together before 1922, and that they both lived in his uncle Lee Poy's house, after his mother's death occupying the room on the small door side.

The applicant stated on page 16 that he started school at the age of eight and when questioned 'How many years did you and Lee Fong attend school together?' he answered 'I do not remember that I ever attended school with him.' On page 17, he stated that he did not remember of ever having attended school with his cousin Lee Sing. The applicant stated on page 19 that after

his mother's death he went to live with his uncle's wife, and that he was living in her house when his father came home in CR 10 (1921), that he does not remember where his brother Lee Fong was living at that time; that he does not remember his brother, Lee Fong, ever having lived in the same house with him before CR 10 (1921); that he has no knowledge of his brother, Lee Fong, ever having lived in his uncle, Lee Poy's house, making the reply—'No, I do not remember anything about that at all.'

On page 9, the al. brother in giving the hours of school while he and the applicant attended together stated—'We started to school at seven o'clock in the morning and returned home for breakfast about nine o'clock in the morning and after breakfast we returned to school and remained there until four o'clock in the afternoon. At four o'clock we returned home for supper, after which we returned to school again and remained at school until seven o'clock in the evening.'

The applicant giving the school hours, that they were from 8 a. m. to 4 p. m., that he returned home for breakfast a little after nine; that he returned home at four o'clock because school was out at that time, never returning to the school at any time after four o'clock in the afternoon.

The applicant and his al. brother Lee Fong, have submitted diagrams marked exhibits 'A' and 'B' of the Sar Hing Gong Village and the locations of the dwelling houses and public building are in agreement. However, the following discrepancies have developed relative to the occupants of houses concerning which both the applicant and Lee Fong were questioned:

The applicant stated, page 20, and indicates same on his diagram, Exhibit ", that Lee Wah Nai's wife, two sons and one daughter lived in

the 1st space, 2nd row from the south, Lee Wah Nai having gone to a foreign country and that Lee Wah Nai did not live in that house while his brother, Lee Fong, was last in China. He stated on recall, page 25, when asked when Lee Wah Nai went abroad that as far as he knows he has never seen him and that he did not see Lee Wah Nai at the Sar Hing Gong Village while Lee Fong was last in China.

Lee Fong stated and indicated on his diagram, Exhibit ", that Lee Wah Nai himself, his wife, two sons and one daughter were living in the 1st space, 2nd row from the south (page 11) and on recall stated on page 24 that Lee Wah Nai was living at the time he arrived home but died about a month afterwards; relative to the death of Lee Wah Nai the applicant states on page 25 and page 26 that no deaths occurred in the Sar Hing Gong Village while his brother was last in China, nor did anyone die in Lee Wah Nai's house.

The applicant stated on page 20 and indicated on Exhibit B the second house, third row, or the house in back of his was occupied by Lee Yen Nai's wife and two sons while his brother was last in China; that Lee Yen Nai had gone to a foreign country. He stated on page 25 that he did not know when Lee Yen Nai went abroad, that he did not see Lee Yen Nai in the Sar Hing Gong Village while his brother, Lee Fong, was in China.

Lee Fong testified and indicated on Exhibit A that Lee Yen Nai, his wife and sons occupied the second house, third row while he was last in China and on recall stated on page 24 that he saw Lee Yen Nai in the Sar Hing Gong Village frequently while he was last in China, every day, when confronted with the fact that his testimony regarding Lee Wah Nai and Lee Yen Nai was in certain disagreement with the applicant, the p.l. brother

—Lee Fong, stated on page 25 'I know that Wah Nai is dead. Yen Nai was there and I saw him often.'

The *demeanor* of the *witnesses while testifying was satisfactory.* The members of the Board have expressed their opinions on page 26 of the *resemblance* to be found between the *al. father, the applicant* and *p.l. al. brother.*

The discrepancies above enumerated are so great that they cast a grave doubt upon the claimed relationship in this case and after a careful consideration of all the testimony adduced it is my opinion that the burden of proof has not been sustained nor the claimed relationship reasonably established and I therefore move that the applicant be denied admission to the U. S. and deported to China the country whence he came."

The Board of Review at Washington, D. C., comments on the alleged discrepancies as follows:

"In the testimony appear discrepancies of which the following are the most material and important:

The al. father and the prior landed brother, who appeared as the applicant's witnesses, both testified that the said al. brother and an al. prior landed cousin attended school with the applicant for nearly two years prior to the said al. brother's coming to the United States in 1922. The *applicant denies* that so far as he knows, either his al. brother or his al. cousin ever attended his school while he was going there. Although he was *only about 8 years old* when his al. brother came to the United States, certainly it would seem that if he was old enough to go to school he was old enough to know whether his brother and cousin were going to the same school and his virtual contradiction of their statement that they attended with him must be regarded as a serious disagreement.

The al. father and the p.l. al. brother testify that the latter lived and slept in the same room in an al. cousin's house in which the applicant lived and slept. The *applicant disclaims* any knowledge that his al. brother occupied the same room or ever lived in the same house in which he lived. This also, although the period referred to was when the applicant was *only about 8 years old,* cannot be taken as an unimportant inconsistency.

The applicant testifies that the hours at the school which he attended was from 8 a. m. to 4 p. m., that he came home at 4 o'clock in the afternoon because school was out and that he never went back to the school after 4 o'clock. The p.l. al. brother on the other hand testifies that the hours at the school attended by him and his brother, who the applicant claims to be, were from 7 a. m. to 7 p. m.; that they went to school together at 7 in the morning; that they came home for dinner at 4 in the afternoon, and then that they returned at 4 in the afternoon, and that they returned together to the school to remain until 7 o'clock in the evening.

The applicant states that one Lee Wah Nai, a neighboring house holder, has been abroad as long as he can remember and he states positively that the said Lee Wah Nai was in the home village when the p.l. al. brother was last at home, from 1927 until this year. The p.l. al. brother testifies that Lee Wah Nai was there when he returned to the home village in 1927 but died about a month later. Not only is the al. brother's statement contradictory by that of the applicant regarding the presence of Lee Wah Nai in the village but the applicant also states that no resident of the home village died during the time that his al. brother was last there.

The applicant testifies that another house holder, one Lee Yen Nai, whose house is next door

to the applicant's, is also abroad and was abroad during his al. brother's visit in the home village. The al. brother on the other hand says that this next door neighbor was at home and that he saw him there every day during his last stay in the home village."

It should be noticed in this last summary of evidence that it is stated

"The applicant *denies* that so far as he knows either his alleged brother or his alleged cousin ever attended this school while he was going there."

By referring to page 17 of the original immigration record it will be noted that the testimony was as follows:

"Q. How many years did you and Lee Fong attend school together? A. I do not remember that I ever attended school with him."

Again it is claimed in this summary:

"The applicant disclaims any knowledge that his alleged brother occupied the same room or ever lived in the same house in which he lived."

Whereas by referring to page 19 of the same record it appears that he stated that *he does not remember where his brother Lee Fong was living at that time; that he does not remember his brother Lee Fong ever having lived in the same house with him before 1921; that he has no knowledge of his brother Lee Fong ever having lived in his uncle Lee Poy's house, making the reply "No, I do not remember anything about that at all."*

When it is borne in mind that appellant was seven years old and less at the times referred to, it is manifest that it is perfectly natural that he would have no memory on what probably appeared to him, as well as to us, to be very immaterial matters.

The only material facts at issue are the citizenship of Lee On and his paternity of the appellant. This has been established, first, by the records of the Immigration Service; second, by the testimony of the appellant, his father, his stepmother, his brother, his uncle, his cousin and one other Chinese witness, without any contradiction whatever on these facts. And no attempt has been made to show that any of these witnesses were of bad character, or that any of them had made at other times statements inconsistent with the present testimony. On the other hand the Immigration Board expressly states on page 30 of their record "The demeanor of the witnesses while testifying was satisfactory."

Notwithstanding this record the appellant has been denied a landing by the local immigration authorities, by the reviewing authorities at Washington and by the United States District Court for this District.

The excerpts from the testimony, which the government solely presents to substantiate the action of the immigration authorities, consists of three in number. The first and second are really a test of memory, as

to whether the boy would or would not remember them. They have reference to a time when he was but seven years of age. The third has reference to a matter which is so taboo among primitive people, that is the subject of death, that no mention was made of it.

The first matter is with regard to the home of this boy and his elder brother at the time his mother died, and until his father returned to their home in China and married again. The father's testimony and that of the elder brother was to the effect that they were taken care of by their aunt, the elder brother's wife. This applicant testified that he had been taken care of by his aunt, but did not know whether his brother was there or not. The obvious situation would be that he was; and the inspector virtually told the boy so but the response was that:

> "Q. Have you any knowledge of your brother, Lee Fong, ever having lived in your uncle's, Lee Poy's, house?" "A. No, I do not remember anything about that at all."

We see from the father's testimony that this boy was two years old Chinese reckoning and he remained with his aunt until he was about eight years old. The dates given have reference to the Chinese calendar. The American calendar is one year less, that is, the boy was one year old when his mother died and seven years old when his father returned to China.

The second matter pointed out is whether these two boys went to school together in China. It is a fact that Lee Fong, the p.l. brother, was in school in China for five years; the last year of which this appellant was

also there, but he does not remember that his brother was in school at the same time.

The third matter was the fact that Lee Wah Nai, who lived in the first space in the second row from the south, recently died in China. This applicant does not tell of the death of Lee Wah Nai, but states that he had gone abroad. We have authority in the case of *U. S. v. Pierce*, 2nd Circuit, 289 Fed. 233, the Circuit Court of Appeals, wherein it is held:

> "In this particular case there was, indeed nothing suspicious in the father's explanation to anyone familiar with the taboos of primitive people. The mention of a dead person is very taboo in primitive culture."

The foregoing three matters are what the government marshalls forth from these records to substantiate the government's action in the denial of this case.

ASSIGNMENT OF ERRORS.

I.

That the Court erred in denying the petition for a writ of habeas corpus herein.

II.

That the Court erred in holding that it had no jurisdiction to issue a habeas corpus as prayed for in the petition herein.

III.

That the Court erred in holding that the allegations contained in the petition herein for a writ of habeas corpus and the facts presented upon the issue made and joined herein were insufficient in law to justify the discharge of the petitioner from custody as prayed for in the said petition.

IV.

That the judgment made and entered herein is contrary to law.

V.

That the judgment made and entered herein is not supported by the evidence.

VI.

That the judgment made and entered herein is contrary to the evidence.

ARGUMENT.

The legal grounds involved in this appeal have been before this Court in such a large number of cases, particularly in the recent cases of *Go Lun v. Nagle,* 22 F. (2d) 246; *Fong Tan Jew ex. rel. Chin Hong Fun v. Tillinghast,* 24 F. (2d) 632; *Nagle v. Dong Ming,* 26 F. (2d) 438; *Nagle v. Wong Ngook Hong,* 27 F. (2d) 650; *Lee Wing You v. Tillinghast,* 27 F. (2d) 580; *Wong Tsick Wye et al. v. Nagle, etc.,* 33 F. (2d) 226; and the very recent case of *Gung You v. Nagle, etc.,*

No. 5809 in this Court, decided on September 23rd last, that the law is well established.

We think the last case is so similar to this as to both law and fact that we can safely base our argument by a comparison of the facts and the law therewith.

As we have stated before, there is no contradiction whatever as to the evidence of the citizenship of the father Lee On, or of his paternity to the appellant; that no attempt has been made by the Government to contradict any of the evidence offered; but the Government has been content in endeavoring to show that there are material discrepancies in the testimony in other respects which render the witnesses giving it unworthy of belief.

As this Court said in the *Gung You* case,

> "The testimony before the immigration authorities is in absolute agreement as to matters respecting appellant's family relations, the principal events of his family life, and as to description and conditions in Haw Hong Village, Sun Ning District, the village in China where appellant was born and has lived all his life. That the alleged father has made various trips to China and has three sons already admitted to, and residing in this country; and that on every occasion (at least six) he has claimed to have a son Gung You, born February 26, 1915; that Gung Sam was in China at such time as to make possible his paternity to a child the appellant's age, he having departed from the United States in June, 1913, and returned to this country in August, 1914; that the appellant's prior landed brothers on the occa-

> sion of their application for admission into the United States claimed to have a brother Gung You, born February 22, 1915. The immigration authorities also concede that the appellant bears some facial and physical resemblance to his alleged father Gung Sam, and appears to be about the age alleged."

So in this case, the testimony as to family relations, family life, conditions in the Soo Hing Gong Village, appellant's native village, are in absolute accord. The alleged father has made various trips to China, and has had one son and two daughters already admitted to, and residing in this country, and on every trip and every time he has been examined (at least seven) he has claimed to have a son Lee How Ping, born August 26, 1914; that the father Lee On was in China at such a time as to make possible his paternity to a child of the appellant's age, he having departed from the United States October 1, 1913, and returned June 21, 1915.

That appellant's prior landed brother and stepmother on the occasion of their applications for admission into this country claimed the appellant as brother and stepson respectively, and the immigration authorities concede that appellant bears facial and physical resemblance to his alleged father and alleged brother and is about the age alleged.

In the *Gung You* case, the order of exclusion was based upon certain evidence supposed to indicate fraud and discrepancies on the part of appellant, his brother and father. These discrepancies related to alleged

manufacturing of a photograph and as to when the brother quit school to come to the United States. In this case there is no claim of fraud, but the objections are based on alleged discrepancies as to the time the appellant went to school dating back to a period when appellant was eight years old or less, and to the quarters occupied at that time by the appellant and his brother.

Although the reviewing officers speak of this as a "denial" on appellant's part, the testimony as heretofore quoted in full shows that the appellant stated that he could not remember these details which he evidently considered immaterial, and which are undoubtedly immaterial to the issues involved.

It seems to us rather pertinent at this point to call the Court's attention to the methods employed by the immigration authorities in conducting their examinations. The immigration record in this case shows that the appellant was not brought before the Board for examination until he had been confined at the Immigration Station nearly two months; that he was then "advised as to the nature of and the penalty of the crime of perjury."—See page one of the record.

How a child of his age could give reasonable and coherent answers to questions after such a beginning is hard to understand. Amongst other questions the appellant was asked the following: "How often does your brother shave?" "Did you ever see him with a growth of whiskers for a day or two?" "This questioning you have just been taken over is intimate with

your home life in China. *Now, why don't you know something about it?"* To which the appellant very justly offered, "I thought the matter of shaving was of no importance so I never paid any attention to it." Also the following: "Q. Who installed the tiled floors in that house? Q. Do you know where they came from?" And much more to the same effect.

As the Court said in the *Gung You* case:

> "The mere hearing of witnesses by an officer is of no avail to a party, if the evidence of competent witnesses is to be entirely disregarded and findings made in the teeth of the testimony of one or a dozen such witnesses, either because of a fixed policy to give a weight to the presumption of law far beyond the legislative intent, or because of a policy calculated to entrap the witness into statements inconsistent with his own or other witnesses' statements, and then to pass an order of exclusion or deportation upon such variances or discrepancies as are reasonably to be expected in all human testimony, either due to lack of memory, to temporary forgetfulness, to lack of observation, or to inattention to questions, or to a failure to fully appreciate their force or significance.
>
> When this policy is accompanied by a separate examination of witnesses without previous knowledge of the subject of interrogation, it is certain that discrepancies will be developed as to minutia of daily life. If such unavoidable and inevitable variances were utilized arbitrarily to justify the rejection of the direct testimony of witnesses, and to justify an order of exclusion, the apparent fairness of the proceedings merely give a judicial color to an obvious and predetermined injustice. *The records of the cases that have been before*

> *the courts already in this and other circuits, indicate a fixed policy of the Department of Labor to minutely examine and cross-examine the applicant and his witnesses and to base the order of the exclusion of the applicant upon contradiction developed between the applicant's own witnesses without seeking for confirmation or contradiction from other witnesses except as the testimony is recorded in the files of the Department of Labor."*

Thus in this case the ony contradictions noted in addition to those already quoted are that the appellant testified that he attended school from 8 a. m. to 4 p. m., whereas the brother stated that for a period (when appellant was a very small boy) they went to school together from 7 a. m. to 7 p. m., less going home for dinner at 4 o'clock in the afternoon. They were not even asked how they fixed their time, or whether their home or their school possessed such an object as a clock or other time piece, which to anyone knowing anything about Chinese villages is extremely doubtful.

Lastly, the question was raised as to whether a neighbor at a certain time was dead or whether, in the language of the appellant, he had gone to a "foreign country." Anyone who knows the Chinese people and their fear and superstitution in regard to death might understand that "going to a foreign country" may be an expression intending to convey the idea of death, just as in certain denominations with us members thereof state that a person has "passed on."

This very question was commented upon in *U. S. v. Pierce,* 289 Fed. 233.

So, as was aptly said in the *Gung You* decision:

"Evidence concerning the town or village of the home is adapted to develop the question as to whether or not the applicant lived in the village and thus in the home from which he claims to come. But discrepancies here must be of the most unsatisfactory kind upon which to base a finding of the credibility of a witness and when the cross-examiner and the Board of Inquiry know nothing of the actual facts concerning the village the result is even more unsatisfactory and inconclusive. It would seem then that the discrepancy in the testimony of a witness to justify a rejection of the testimony must be on some fact logically related to the matter of relationship and of such a nature that the error, or discrepancy cannot reasonably be ascribed to ignorance or forgetfulness, and must reasonably indicate a lack of veracity. The difficulty in these cases of 'discrepancy' is that there is no standard of comparison. The immigration authorities know nothing of the actual facts but match witness against witness and thus develop inconsistencies. Suppose two witnesses testify that the applicant is the son of an American citizen, but entirely disagree as to some facts concerning the village from which they all claim to come, if both are shown to be wrong in some important and noteworthy feature it might justify the rejection of the testimony of both, but in the absence of other and affirmative evidence as to the actual fact how can the testimony of both be rejected? Can we as a matter of common sense, reject one because the other has told the truth, and then reject the other also? This seems entirely unreasonable."

In that case the Court determines that

"Aside from the appearance of the witness, his demeanor on the stand, and the reasonableness of

his testimony, his character as determined by his manner of testifying or by evidence of a good or bad reputation, he can only be impeached by evidence of contradictory statements made out of court or in court on material matters. This is the law's method of measuring the credibility of witnesses."

And here the examining officers state that the appearance of the witnesses and their demeanor on the stand was good, and certainly their testimony was reasonable and no attempt was made to impeach any of the witnesses by evidence of contradictory statements. It is thus apparent that all attempts to discredit the testimony by such alleged inconsistencies must be abandoned.

There is no conflict or contradiction whatever in regard to the citizenship of Lee On, the father, or his paternity of the appellant. The same process of reasoning used by the Court in the case of *Gung You* applies with equal force to this appeal. Lee On's family has lived long in this community, and the testimony of himself and his relatives has been known to the immigration authorities for many years. On the material issues there is nothing unreasonable and nothing irregular. Affirmative evidence in the shape of an affidavit by Mrs. Ethel S. Abadie is to be found with the record of the Immigration Service which is to the effect that she has resided in Berkeley, California, over thirty years and has been acquainted with the father, Lee On, during that period of time, and that she has long known of his family affairs and that

one of his sons was still in China; and further, that his reputation for truth, honesty and integrity is good.

There is no evidence to show that he is engaged in aiding Chinese to come to this country other than his own family. And now that his wife and three other children are here with him it would be a terrific injustice for this small boy to be compelled to leave his family and return to China without any hope for future paternal care.

To again quote from the language of the *Gung You* case:

> "To reject the evidence of all these witnesses as to the relationship of the applicant under such conditions and because of such a discrepancy is purely arbitrary."

This case simply affirmed many previous decisions rendered not only in this circuit but in other circuits as well, as for example the case of *Lee Wing You v. Tillinghast,* 27 F. (2d) 580, First Circuit, where the Court held:

> "The cross-examination took the wide scope described by Judge Rudkin in Go Lun v. Nagle, 22 Fed. (2d) 246, 247, and by Judge Bingham in Johnson v. Ng. Ling Fong, 17 Fed. (2d) 11, 12. *It was not directed to matters bearing even indirectly on the relationship in question; the endeavor was to find discrepancies among the witnesses as to the rows of houses, the occupants thereof, the monument or marker over grandparents' graves, etc.*
>
> "So proceeding, the immigration tribunals succeeded in developing some very slight discrep-

ancies on matters purely collateral on which they ground their findings that the relationship is not reasonably established. But this euphemistic phrase must not be allowed to disguise the real situation. *There is here no room for honest error. The family exists as the three witnesses describe it, unless the record as a whole furnished some basis, upon which reasonable, truth-seeking minds can ground a conclusion of fraud and perjury on the part of all three witnesses. There is no conflicting evidence, direct or indirect, on the question of relationship.* As noted above, the three witnesses were in absolute agreement on the vital issue of relationship and as to who the family are. We assume that these tribunals are not bound by the rules of evidence applicable in a jury trial. *But they are bound by the rules of reason and logic—by what is commonly referred to as common sense.*"

And the Supreme Court of the United States in the case of *Ng. Fun Ho et al., v. White,* 259 U. S. 276, held:

> "To deport one who so claims to be a citizen obviously deprived him of liberty, as was pointed out in Chin Yow v. U. S., 208 U. S. 8, 13, 28 Sup. Ct. 201, 52 L. Ed. 369. It may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court."

In view of the law and the facts it is very unfortunate that the Immigration Service takes the narrow

stand it does and puts these poor people to the large expense incident to an appeal to this Court. It may be possible that some of the examining officers who seem to be steeped in prejudice against those of Chinese blood take adverse action, feeling that in the majority of cases the applicants will be unable to pursue their rights through the courts, and that as a consequence their predetermined policy of exclusion will be accomplished.

We therefore ask in this case that the appeal be sustained; the American citizenship of the appellant be determined; the judgment of the lower court reversed, and instructions given to discharge the appellant from custody.

Respectfully submitted,

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Attorneys for Appellant.

N. B. To take advantage of the order setting this cause for an early hearing it was necessary to get out this brief before the transcript came back from the printer. Therefore as no reference to the transcript paging could be made, we have set forth the facts herein more fully perhaps than would have been otherwise done.

No. 5983

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

LEE HOW PING, on Habeas Corpus,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE

GEORGE J. HATFIELD,
United States Attorney,

GEORGE N. CROCKER,
Asst. United States Attorney,
Attorneys for Appellee.

FILED
NOV

Sea , Stratford & Kerr, S. F.

TABLE OF AUTHORITIES CITED

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BRIEF FOR APPELLEE

MAY IT PLEASE THE COURT:

The situation in the present case is as follows:

At the hearing before the Board, three witnesses testified, viz., the applicant, who is fifteen years old; Lee On, his alleged father, who visited China from October, 1913, to June, 1915, and from January, 1921, to November, 1922, and his alleged brother, Lee Hong, aged eighteen, who first came to the United States in November, 1922, and was back in China from October, 1927, to June, 1929 (Tr. pp. 25-26).

Appellant's brief comments upon testimony of other alleged relatives at various times that appellant is the

son of Lee On. None of such testimony connects appellant with Lee On, but is merely to the effect that Lee On had a son of the name claimed by appellant.

All the testimony shown by the prior records of the Immigration Service over a period of years relative to Lee How Ping, reputed son of Lee On, is that said Lee How Ping lived with his brother, Lee Fong, in their uncle's house in the home village from the time their mother died in 1916 until Lee On returned to China in 1921. The alleged father and brother of appellant so testified at this hearing (Tr. pp. 26-27). The alleged brother testified further that he and Lee How Ping lived in the same room in his uncle's house during that period (Tr. pp. 27-28).

On the other hand, appellant testified that while he himself was living in his uncle's house during the period mentioned, he does not remember that Lee Fong, his alleged brother, ever lived in the same house with him; that he does not remember that Lee Fong ever lived in his uncle's house; and that he has never been told that such was the case (Tr. p. 28).

The testimony shown by the prior records of the Immigration Service relative to this family is also to the effect that Lee How Ping, reputed son of Lee On, attended school in the home village with his brother, Lee Fong, for a period of slightly less than two years before the latter came to the United States in 1922 (Tr. p. 29, 30), and that he also was attending school at that place with his cousin, Lee Sing (Tr. p. 29, 30, 31). The testimony shows that this alleged cousin was

attending that school as late as 1926 (Immig. Rec. 27285/5-27 p. 14), and that Lee How Ping attended that school since 1921 (Imm. Rec. 55701/444, pp. 16, 18, 26).

On the other hand, appellant definitely testifies that he does not remember that he ever attended school with his alleged brother, Lee Fong; that he does not remember that he ever attended school with his alleged cousin, Lee Sing; that he himself was eight or nine years old when Lee Fong first came to the United States, and that Lee Fong did not attend school with him before Lee Fong first came to the United States, and that he does not remember what Lee Fong was doing before he came to the United States in 1922 (Tr. pp. 32, 33).

Appellant argues that these conflicts are wholly immaterial to the issue of relationship, and further, that the applicant may have forgotten these matters, due to his immature age at the time involved.

These particular items are not in any sense collateral. Appellant's testimony on these points is directly opposed to what all the other testimony would tend to show, relative to whether or not Lee How Ping, reputed son of Lee On, had been living with the members of Lee On's family. Relative to a similar situation, this Court said, in the very recent case of *Yee Mon vs. Weedin,* 34 F. (2d) 266, that such testimony of the applicant would tend to show that he did not live with the family of his alleged father during the period mentioned, and consequently, that he is not

the son of his alleged father. The Court said further, that whether there may be some other explanation of the discrepancy was a question for the Immigration authorities.

Appellant's suggested explanation that such testimony of his was due to his immature age during the period referred to, is not convincing. Certainly, if he lived in the same room in the same house with his alleged brother until he had reached the age of seven years (American reckoning), he should have some recollection or knowledge, derived from other sources, of that fact. Furthermore, the period involved relative to the school attendance, relates to a period up to the end of 1922, when appellant would be over eight years of age (American reckoning). It should be borne in mind that the village is said to consist of but twelve dwellings and one school (Imm. Rec. 55701/444, p. 15). Certainly, appellant should not be utterly ignorant of the fact that he attended school with his alleged brother when he was eight years of age, especially since this matter, and the other matter relative to his residence with his brother, were specifically called to his attention.

Moreover, the alleged cousin is said to have been attending school up to 1926, with appellant, and at that time appellant would have reached the age of twelve years.

Since on these points the conflicting evidence relates directly to the fact of whether or not appellant has been living with the members of his claimed family,

and conducting himself as a member of such family, the case of *Gung You vs. Nagle,* 34 F. (2d) 848, is not in point, since the discrepancies discussed in that case related solely to collateral matters.

The third conflict is this:

Lee Fong, appellant's alleged brother, testified that he was last in China from October, 1927, to June, 1929; that when he arrived home on that visit Lee Wah Nai, *who resided in the house directly adjacent to his own home,* was living there, but that he died about a month afterward (Tr. pp. 34, 35).

Appellant testified that as far as he knows, he has never seen the person referred to, and he only heard that such person was abroad (Tr. p. 35). He testified further that there were no deaths in the home village while his brother was last in China, and no funerals held in the village during that time. He testified that if there had been any deaths or funerals in the village, he would know it, and that no one died or was buried in the village since he has been able to understand anything (Tr. p. 36).

Appellant's attention was particularly directed to the house in question, and he was asked whether any one had died in that house while his brother Lee Fong was last in China, and answered in the negative (Tr. p. 36).

Since appellant's immature age obviously cannot be invoked on this point, the explanation suggested in appellant's brief is that the mention of death is taboo

among Chinese. Apparently this alleged taboo did not inhibit Lee Fong from testifying in detail as to the death of this person. Furthermore, appellant himself testified as to a death in several other instances:

(a) That his mother died in 1921 (Imm. Rec. 55701/444 p. 24);

(b) That his grandfather is dead (Id. p. 25).

The next conflict is as follows:

Lee Fong testifies that while he was last in China from October, 1927, to June, 1929, one Lee Yen Nai was living in the house directly behind his own house, and that he had seen this person every day during that period (Tr. pp. 36, 37).

On the other hand, appellant testified positively that this person has gone to a foreign country, and did not live in the house mentioned while his alleged brother was last in China, and that he did not see this person in the home village during that period (Tr. pp. 37, 38).

This Court has uniformly held that the decision of the immigration board will not be overturned unless it is a capricious and arbitrary abuse of discretion and completely without support in the evidence before the Board.

Quan Jue v. Nagle, (C.C.A.) 5868, decided October 28, 1929;
Chin Share Nging v. Nagle, 27 F. (2d) 848;
Hom Dong Wah v. Weedin, 24 F. (2d) 774.

In Chin Share Nging v. Nagle, supra, the principal

discrepancies related to occupants of the two houses adjoining the applicant's alleged residence.

Certainly, upon the record as made in this case, there was substantial evidence that appellant had not been living in the family of his alleged father over the period of years claimed, and hence, that he is not the son of said father. This Court has recently said that the question of whether or not there is an explanation of the discrepancies is one for the immigration officers.

> *Quan Jue v. Nagle,* (C.C.A.) 5868, decided October 28, 1929;
> *Yee Mon v. Weedin,* supra.

Appellant then injects into his brief several irrelevant and frivolous complaints, and considerable vituperation and invective directed at the administrative officers. The first of these is directed at the statement in the record that the applicant was "advised as to the nature of, and the penalty of the crime of perjury" (Imm. Rec. 55701/444, p. 11). It is difficult for us to conceive what possible objection or criticism can arise by reason of the fact that the significance of an oath was explained to the applicant, a Chinese boy.

It is also complained that appellant was held at Angel Island nearly two months before his case was heard. In the first place, delay of the commencement of the hearing is immaterial,

> *Quon Quon Poy v. Johnson,* 273 U. S. 352,

and in the second place, such delay as occurred in this particular instance was largely due to the lack of

prompt action on the part of appellant's counsel in producing the affidavits of appellant's witnesses, which are required by the rules, in order to permit of the case being set. Appellant arrived on June 26th, and an attorney filed an appearance on that date (Imm. Rec. 55701/444, p. 2). The following day, said attorney was notified to file his affidavits of witnesses promptly (Id. p. 4), and the first affidavit was filed on July 12th (Id. p. 6). Thereafter, the attorney was advised that since the records indicated the presence in the United States of the alleged stepmother of appellant, her testimony would appear to be pertinent (Id. p. 7), and on July 30th, said attorney advised that he did not desire to produce that witness (Id. p. 8). Two days later the case was set for hearing on August 15th, on which date it was heard (Id. pp. 9-11).

We respectfully submit that no abuse of discretion on the part of the immigration authorities has been shown in the case before this Court; that the decision of the executive is based upon material discrepancies in the testimony, which cast serious doubt upon the existence of the claimed relationship; and that the judgment of the Court below should be affirmed.

Respectfully submitted,

GEORGE J. HATFIELD,
United States Attorney,

GEORGE N. CROCKER,
Asst. United States Attorney,
Attorneys for Appellee.

No. 5985

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARBLE E. BURCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

FILED
JAN 2 - 1931
PAUL P. O'BRIEN,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Attorneys for Appellant:

HUSTON, HUSTON & HUSTON, Esqs.;
PERCY NAPTON, Esq., Woodland, Calif.

Attorneys for Appellee:

GEO. J. HATFIELD, Esq., U. S. Attorney;
ALBERT E. SHEETS, Esq., Assistant U. S. Attorney.

In the Northern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARBLE E. BURCH,

Defendant.

BILL OF COMPLAINT.

To the Honorable, the Judge of the District Court of the United States Within and for the Northern District of California, Second Division.

The United States of America, by Geo. J. Hatfield, United States Attorney for the Northern District of California, complains against Marble E. Burch, and for cause of action alleges:

I.

That Marble E. Burch is a resident of Lassen County, California, in the Northern District of California.

II.

That the United States is now and has been at all times herein mentioned the owner of all of the Government lands embraced in Township 30 N., Range 7 E., M. D. M., and more particularly of Section 2 in said township and range as delineated and described on the plat of survey officially approved by the General Land Office and the Department of the Interior, all situated within the exterior boundaries of the Lassen National Forest in Lassen County, State and Northern District of California.

III.

That under the authority conferred by the Acts of Congress approved March 3, 1891 (26 Stats. 1103), and June 4, 1897, (30 Stat. 35), the above-described lands were on or about the year 1902 withdrawn as the Lassen Peak and Diamond Mountain Forest Reserves and were in the year 1907 included within the Lassen Peak National Forest and [1*] later within the Lassen National Forest and they are now and have been at all times herein mentioned a part and parcel of said Lassen National Forest.

IV.

That under the authority conferred by the Acts

*Page-number appearing at the foot of page of original certified Transcript of Record.

of Congress of June 4, 1897 (30 Stat. 35), Feb. 1, 1905 (33 Stat. 628), of Nov. 9, 1921 (42 Stat. 212), and of January 18, 1927 (Public No. 552), the plaintiff and Secretary of Agriculture through the District Forester of the Forest Service, United States Department of Agriculture, propose and intend to build a road through the above-described Section 2, Township 30 N., Range 7 E., M. D. M., on the east side of Silver Lake between the east bank or shore line of said Lake which is located in Section 2 and the east section line of said Section 2.

V.

That the said defendant without permit or authority from the plaintiff or the Secretary of Agriculture or the District Forester and without right has erected a fence upon and across the public domain lying between said east section line of said Section 2 and the east bank or shore line of said Silver Lake, more particularly within Lot 1 of said Section 2, and said defendant has refused and neglected to remove said fence although requested to do so in order that said road might be constructed; that the erection of said fence by the defendant has been and now is obstructing and preventing the construction of the contemplated road above mentioned and said road cannot be constructed unless said fence is removed.

VI.

That the plaintiff and its agents are desirous of immediately constructing said road since it is neces-

sary for the proper administration of the Lassen National Forest.

WHEREAS the plaintiff is without adequate remedy save in a Court of Equity it prays that this Honorable Court grant a [2] writ of injunction directed to said defendant ordering him to take down and remove said fence or any other obstruction or improvement now existing on the above-described lands of the plaintiff within the Lassen National Forest and restrain said defendant, his attorneys, agents and servants from, in any manner, hindering, obstructing or interfering with the construction and completion of a road on and over the above-described lands of the plaintiff in Lot 1, Section 2, Township 30 N., Range 7 E., M. D. M.

That said defendant may make a full, true, direct and perfect answer to the matters hereinbefore stated and charged but not under oath, and answer under oath being hereby expressly waived.

That such further relief in the premises be granted as equity may require and that this Honorable Court may seem meet.

GEO. J. HATFIELD,
United States Attorney,
ALBERT E. SHEETS,
Assistant United States Attorney.

[Endorsed]: Filed Sep. 27, 1927. [3]

[Title of Court and Cause.]

ANSWER TO BILL OF COMPLAINT.

Comes now Marble E. Burch and answering the bill of complaint in the above-entitled suit admits, denies and avers as follows:

I.

Admits each and all the allegations of Paragraph I, II and III.

II.

Answering Paragraph IV of the complaint defendant denies that under the authority conferred by the Acts of Congress of June 5, 1897 (30 Stat. 35), Feb. 1, 1905 (33 Stat. 628), of Nov. 9, 1921 (42 Stat. 212), and of January 18, 1927 (Public No. 552), the plaintiff and Secretary of Agriculture through the District Forester of the Forest Service, United States Department of Agriculture, propose or intend to build a road through the above-described Section Two (2), Township Thirty (30), N., Range Seven (7) E., M. D. M., on the east side of Silver Lake between the east bank or shore line of said Section Two (2), but in this connection the defendant avers that the road so proposed to be built and intended to be built by the plaintiff and Secretary of Agriculture through the District Forester of the Forest Service United States Department of Agriculture will run through and be constructed over Section One (1), Township Thirty

(30) N., Range Seven (7) E., M. D. M., the land of the defendant herein. [4]

Further answering said Paragraph IV the defendant avers that at all times mentioned in the bill of complaint and for a long time prior hitherto was and now is the owner of and in possession of the following described land, situate in the County of Lassen, State of California and bounded and described as follows to wit:

> Lots 3 and 4 and S.½ of NW.¼ of Section 1, in Township 30 North, Range 7 East, M. D. M. containing 159.22 acres.

and which said land of the defendant at the times mentioned in the complaint or at any other time or at all comprised a part or parcel of the land or lands or of any lands withdrawn as the Lassen Peak and Diamond Mountain Forest Reserve or any other reserve or at all.

Further answering Paragraph IV the defendant denies that his said land or any part, parcel or portion thereof was or now is at the times mentioned in the complaint or at any other time or at all included within the limits or boundaries or the Lassen Peak National Forest or the Lassen National Forest or any other National Forest or National Forest Reserve or at all.

III.

Answering Paragraph V the defendant denies that at the times mentioned in the complaint or at any other time or at all he has erected a fence upon or across the public domain of the United States of

America or upon or across any land or Forest Reserve of the United States or upon or across any National Reserve or at all.

Further answering Paragraph V the defendant denies that he has erected a fence upon or across the public domain of the United States of America or upon the domain or preserve of the Lassen Peak and Diamond Mountain Forest Reserve or upon or across the Lassen Peak National Forest or any other National Forest or at all lying between said East section line of said [5] Section 2, or the east bank or shore line of said Silver Lake within Lot One (1) thereof mentioned in the complaint, or upon or over any other part *of* portion of Section Two (2), Township Thirty (30) N., Range Seven (7) E., M. D. M., but in this connection the defendant avers that he has constructed and maintained a fence along and upon the west line of Section One (1), and which said Section One (1), Township Thirty (30) N., Range Seven (7) E., M. D. M., at all times mentioned in the complaint and for a long time prior to was and now is the land of the defendant.

Further answering Paragraph V the defendant denies that the erection of said fence or any other fence or at all by the defendant at the times mentioned in complaint or at any other time or at all has or now is obstructing or preventing the construction of a road in Section Two (2), Township Thirty (30) N., Range Seven (7) East, M. D. M., or in Lassen Peak and Diamond Mountain Forest

Reserves or Lassen Peak National Forest or Lassen National Forrest, or any other Reserve or at All.

Further answering Paragraph V defendant denies that the proposed road mentioned in the complaint cannot be constructed unless defendant's fence is removed.

IV.

As to whether the plaintiff or his agents are desirous or otherwise or at all of immediately constructing said road or at any other time or at all that it is necessary to construct said road for the proper administration of the Lassen National Forest, or for any other purpose or at all, the defendant has no knowledge, information or belief, sufficient to enable him to answer the allegations thereof, and therefore and upon that ground denies the same. [6]

For a cross bill of complaint, the defendant avers:

I.

That the defendant is now and for a long time hitherto has been the owner and in possession of that certain piece or parcel of land situated, lying and being in the County of Lassen, State of California, and described as follows, to wit:

> Lots 3 and 4 and S.½ of NW.¼ of Section 1 in Township 30 North, Range 7 East, M. D. M., containing 159.22 acres.

II.

That the plaintiff herein claims an estate or interest therein adverse to the said plaintiff.

III.

That the claim of the said plaintiff is without any right whatever and that the said plaintiff has not any estate right, title or interest whatever in the above-mentioned land, or any part thereof.

WHEREFORE the defendant prays:

1. That the plaintiff may be required to set forth the nature of its claim and that all adverse claims of the plaintiff may be determined by decree of this Court.

2. That by said decree it be declared and adjudged that the plaintiff has no estate or interest whatever in or to said land and premises and that the defendant's title is good and valid.

3. That the plaintiff be forever enjoined and debarred from asserting any claim whatever in or to the above-mentioned land and premises adverse to the defendant and for such other relief as to this Honorable Court shall seem meet and agreeable to equity and for his costs.

HUSTON, HUSTON and HUSTON,
Attorneys for Defendant. [7]

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL.

State of California,
County of Yolo,—ss.

Leta Curson, being first duly sworn, deposes and says:

That affiant at all the times herein mentioned was and is a citizen of the United States, residing in the City of Woodland, County of Yolo, State of California, over the age of twenty-one years, not a party to nor *interest* in the above *the above* entitled action, and competent to be a witness upon the hearing of any proceedings therein; that she is, and was at all the times herein mentioned, a clerk in the office of Huston, Huston & Huston, attorneys at law; that the said Huston, Huston & Huston are the attorneys for the defendant in the above-entitled action; that at all the times herein mentioned they resided and had their offices at the City of Woodland, County of Yolo, State of California; that Geo. J. Hatfield is the attorney of record for the above-named plaintiff in said action, and that the said Geo. J. Hatfield at all the times herein mentioned had his office in the Federal Building in the City of Sacramento, County of Sacramento, State of California; that at all the times herein mentioned in each of said two places there is a United States postoffice and between said two places there is a regular daily communication [8] by mail; that on the 16th day of November, 1927, affiant Leta Curson, acting for and under the direction of Huston, Huston & Huston, attorneys for said defendant as aforesaid, served a true copy of the annexed answer to bill of complaint herein on the said Geo. J. Hatfield, the attorney for the said plaintiff, by depositing such copy of said answer to bill of complaint on said date in the post-office at the City of Woodland, and the said county of Yolo, State of California, proper*ty*

enclosed in a sealed envelope, addressed to the said Geo. J. Hatfield, United States Attorney, Federal Building, Sacramento, California.

LETA CURSON.

Subscribed and sworn to before me this 16th day of November, 1927.

[Seal] ARTHUR C. HUSTON, Jr.,
Notary Public in and for the County of Yolo, State of California.

[Endorsed]: Filed Nov. 17, 1927. [9]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Thursday, the 17th day of May, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—MAY 17, 1928—TRIAL.

This case came on regularly this day for trial. A. E. Sheets and E. R. Bonsall, Esqrs., Asst. U. S. Attorneys, and H. P. Dechant, Esq., appearing on behalf of the plaintiff and Percy Napton and Robt. W. Huston, Esqrs., appearing on behalf of the defendant. W. G. Durbin and John C. Ing were sworn and testified on behalf of the plaintiff, and

plaintiff introduced in evidence its exhibits marked Nos. 1 and 2, and the plaintiff rested. The defendant moved for a decree in its favor, which motion was denied and to which ruling the defendant excepted. Marble E. Burch, Arthur Bradt were sworn and testified on behalf of defendant and defendant introduced in evidence his Exhibits marked "A," "B," and "C." The evidence being closed, the case was submitted on briefs to be filed in 20 days and 5 days. [10]

[Title of Court and Cause.]

SPECIAL FINDINGS OF FACTS.

This cause having come on regularly to be heard, the complainant appearing by its solicitor, Edgar R. Bonsall, Esquire, Assistant United States Attorney, and the defendant appearing by and through his solicitors, Messrs. Huston & Huston of Woodland, California; and evidence, oral and documentary, having been introduced by the respective parties and the cause having been submitted to the Court for decision, and the Court having duly considered the pleadings and the evidence, finds the following facts:

1. That the complainant, the United States of America, is the owner and in possession of all of Section 2, Township 30 North, Range 7 East, M. D. M., as such section is delineated and described on the official plat of survey of said Township and Range, approved by the United States Surveyor

General for California on July 11, 1883, and on file in the United States Land Office at Sacramento, California.

2. That the defendant, Marble E. Burch, is a resident of Lassen County within the State and Northern District of California, and is the owner and in possession of the NW.¼ of Section 1, Township 30 North, Range 7 East, M. D. M., as delineated on said official plat.

3. That Township 30 North, Range 7 East, M. D. M., was on or about the year 1902 withdrawn for forest purposes and has been and now is included within the boundaries of the Lassen National Forest. [11]

4. That the Secretary of Agriculture by and through his agents, the District *D*orester and the Forest Supervisor of the Lassen National Forest, is about to build a road in Lot 1 of said Section 2, Township 30 North, Range 7 East, M. D. M., between the east shore line of Silver Lake and the east section line of said Section 2 as delineated on the aforesaid official plat.

5. That the defendant, Marble E. Burch, has erected a fence and other improvements upon the Government land in Lot 1 of Section 2, Township 30 West, Range 7 East, M. D. M., between the east shore line of Silver Lake and the east section line of said Section 2, without permit or other authority from the complainant and has been and is now interfering with the construction of the aforesaid road.

6. That the land of the defendant in the NW.¼ of Section 1, Township 30 North, Range 7 East, M. D. M., does not touch the shore line or embrace any portion of Silver Lake.

7. That the position of the section line between Sections 1 and 2, Township 30 North, Range 7 East, M. D. M., is as shown on the official plat of survey of said Township and Range approved July 11, 1883, on file in the United States Land Office at Sacramento, California, a copy of said plat being a part of the evidence in this cause.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Service of copy of within special findings of fact admitted this 3d day of October, 1928.

HUSTON, HUSTON & HUSTON.

[Endorsed]: Lodged Oct. 9, 1929.

Filed Oct. 25, 1929. [12]

[Title of Court and Cause.]

EXCEPTION TO SPECIAL FINDINGS OF FACT AND PROPOSED FINDINGS.

Now comes the defendant in the above-entitled action and excepts to the special findings of fact proposed by the plaintiff herein in that said findings of fact are not supported by any evidence and are contrary to law.

Defendant proposes the following special findings of fact and asks the Court to adopt, sign and file the same.

1. It is not true that the said defendant without permit or authority from the plaintiff, or the Secretary of Agriculture, or the District Forester, or without right or otherwise, or at all, has erected a fence upon and across the public domain described in paragraph V of said complaint, or otherwise, or at all, or that he has refused or neglected to remove any fence erected on the public domain, but on the contrary the said fence referred to in said complaint is erected upon the lands of the said defendant; that said fence erected by said defendant on his own land does not now and never did obstruct or prevent the construction of any contemplated road over the public domain.

2. That at the time of the filing of the complaint, and at all times mentioned in the complaint and for a long time prior thereto, the defendant was and is the owner of, in possession of and entitled [13] to the possession of Lots three (3) and four (4) and the South one-half (#½) of the Northwest one-quarter (NW.¼) of Section One (1), Township Thirty (30) North, Range Seven (7) East, M. D. M., and that the West and North boundaries of defendant's land embraces a portion of Silver Lake in the manner hereinafter mentioned, and in accordance with and in conformity to an official plat or survey of said township and range approved July, 1883, on file in the United States Land Office at Sacramento, California, and in accordance with

and in conformity to the field-notes of the original survey made by George Sandow, Public Surveyor, and which said field-notes are now on file in the office of the Public Survey at San Francisco, California, viz.: beginning at the Southwest corner of Section One, Township Thirty North, Range Seven East, M. D. M., and thence running North on true line between Sections One (1) and Two (2), variation 18° 20′ at 23.00 chains. A small lake bears West 3 chains distant at 40.00 chains. Set a volcanic stone 16x7x6 inches marked one-quarter on W. face, ten inches deep for one-quarter section corner from which bears

Larch 12 ins. dia. N. 82° E. 57 lks.

Larch 11 ins. Dis. N. 32° W. 52 lks.

Both marked ¼ S. B. T.

78.85 chains intersect 6th Standard N. 21.15 chs. S. 87° 47′ W. of corner to secs. 35, 36 T. 31 N. and set volcanic stone 15x14x8 ins. with 1 notch to E. and 5 to W. and marked C.C. on S., 10 ins. deep for closing corner to secs. 1, 2.

3. It is not true that the lands enclosed by said fence and belonging to the said defendant have been, or are now included within the boundaries of the Lassen National Forest, or any part thereof.

4. It is not true that defendant has erected a fence or any other improvements upon the Government land in Lot One (1) of Section [14] Two (2), Township Thirty (30) North, Range Seven (7) East, M. D. M., between the East shore line of Silver Lake, and the East Section line of Section Two (2), without permit or authority from plaintiff, or other-

wise or at all; it is not true that defendant has been or is now interfering with the construction of the road referred to in said complaint.

5. It is true that the land of the defendant in the Northwest one-quarter of Section One (1), Township Thirty (30) North, Range Seven (7) East, M. D. M., does touch the shore line and embrace a portion of Silver Lake; that the said fence heretofore constructed and now existing along the shore line of said Silver Lake by said defendant was and is the true boundary line between the lands of the said defendant and the plaintiff.

6. That all of the lands now in the possession of said defendant and inclosed by said fence is owned by and is in the possession of said defendant and is not a part of the public domain and the said plaintiff has no right, title or interest therein.

CONCLUSIONS OF LAW.

The Court deduces the following conclusions of law from the foregoing findings of fact:

I.

That the plaintiff is entitled to take nothing by said complaint, and defendant is entitled to recover his costs herein.

II.

That the defendant was at the time of the filing of this complaint, and for a long time prior thereto and now is the owner of and in possession of the real property hereinbefore described.

Dated: ———, 1928.

———————————,
Judge.

Exceptions overruled. Proposed findings disallowed.

A. F. ST. SURE,
D. J.

Service of the within exception, etc., by copy admitted this 8th day [15] of Oct., 1928.

ALBERT E. SHEETS,
Attorney for Pltff.

[Endorsed]: Lodged Oct. 8, 1928.

Filed Oct. 25, 1928. [16]

———

[Title of Court and Cause.]

NOTICE OF MOTION AND MOTION.

To the Plaintiff Above Named and to Its Attorneys, GEORGE A. HATFIELD and ALBERT E. SHEETS.

You and each of you will please take notice that at the courtroom of the above-mentioned court in the Federal Building, Sacramento, California, on Monday, the 15th day of October, 1928, at the hour of ten o'clock A. M., or as soon thereafter as counsel may be heard, the defendant will move the Court to adopt, sign and file special findings of fact in lieu of the special findings heretofore made, a copy of which proposed special findings on the part

of the defendant having been heretofore served upon you.

Said motion will be made on the ground that the special findings of fact heretofore made are not supported by the evidence and are contrary to law. Said motion will be based upon the records, papers and files and upon the proposed special findings aforesaid.

HUSTON, HUSTON & HUSTON,
Attorneys for Defendant.

Service of the within notice, etc., by copy admitted this 8th day of October, 1928.

ALBERT E. SHEETS,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 8, 1928. [17]

In the Northern Division of the United States District Court for the Northern District of California.

IN EQUITY—No. 253.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARBLE E. BURCH,
Defendant.

DECREE.

This cause coming on regularly to be heard at this term, on the 17th day of May, 1928, the com-

plainant appearing by its solicitors Geo. J. Hatfield, United States Attorney, Albert E. Sheets, Esquire, and Edgar R. Bonsall, Esquire, Assistant United States Attorneys, and the defendant appearing by and through his solicitors, Messrs. Huston, Huston and Huston, Woodland, California, and testimony having been introduced and proofs offered by the complainant and by the defendant, arguments heard and points and authorities filed and the cause submitted to the Court for its consideration and decision and the same having been duly considered, and special findings of fact having been duly engrossed and filed,—

Now, therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I.

That the plaintiff is entitled to the possession, occupancy and ownership of the land described in the bill of complaint situate in Section 2, Township 30 North, Range 7 East, M. D. M., as such section is delineated and described on the official plat of survey of said Township and Range, approved by the United States Surveyor-general for California, on July 11, 1883, and on file in the United States Land Office at Sacramento, California, and more particularly the land situate in Lot 1 of said Section 2, between the east section line of said Section and the shore line of Silver Lake as delineated on said official plat. [18]

II.

That the defendant is without any estate, right,

title or interest in the land above described in Section 2, Township 30 North, Range 7 East, M. D. M., and he is hereby forever enjoined and debarred from asserting any claim whatever in or to the above-mentioned land adverse to plaintiff.

III.

That the defendant be, and is hereby enjoined from maintaining the fence mentioned in the bill of complaint or any other obstruction or improvement now existing on said land of the plaintiff, and that said defendant, his attorney, agents or servants be, and hereby are enjoined from in any manner obstructing or interfering with the construction and completion of a road on and over the plaintiff's lands described in the bill of complaint and said injunction be and the same hereby is, made perpetual.

IV.

That the plaintiff have and recover from defendant all costs herein, together with any other further costs as may be hereafter incurred or taxed herein and that execution be issued therefor.

Done in open court this 27th day of Oct., 1928.

A. F. ST. SURE.

[Endorsed]: Filed Oct. 27, 1928. [19]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE UNDER EQUITY RULE No. 75.

BE IT REMEMBERED, that this cause came on regularly for hearing before the Court sitting in equity on the 17th day of May, 1928, upon the bill of complaint and the answer of the defendant, Marble E. Burch. The following is all the evidence introduced and received by the Court and the proceedings had in said case:

COMPLAINANT'S CASE.

The complainant put in evidence a certified copy of the original map upon which defendant's patent is based—Exhibit No. 1. A certified copy of the field-notes of Sandow, the surveyor who made the map, and which map was made from his field-notes —Exhibit No. 2.

DEFENDANT'S CASE.

The defendant put in evidence the patent from the United States to Mr. Cooper by introducing a certified copy thereof—Defendant's Exhibit "A." The deed from John F. Cooper and Abbie Cooper to Marble E. Burch, defendant herein—Defendant's Exhibit "B." Map made by witness Bragt, a surveyor—Defendant's Exhibit "C."

The above and foregoing is all the evidence introduced at the trial of the case and all proceedings

had in the trial thereof, and the following is all the evidence*d* introduced by the complainant in support of his bill of complaint, viz.: [20]

TESTIMONY OF W. G. DURBIN, FOR PLAINTIFF.

W. G. DURBIN, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

I am the forest supervisor of the Lassen National Forest. (Witness shown map.) That is a map of the recreational land laid out around Sylvan Lake by the Forest Service; that is in Township Thirty (30), Range Seven (7) and 31–7. The Government wishes to build a road around there, that is going from a point where the county road is built from the valley to the lake and then extending around in a southerly direction around the East side of Sylvan Lake. The map which was handed to me a moment ago is a recent map.

TESTIMONY OF JOHN C. INGE, FOR PLAINTIFF.

JOHN C. INGE, a witness on behalf of the plaintiff, being duly sworn, testified as follows:

I am Registrar of the United States Land Office, Sacramento, California. (Witness shown Government Exhibit 1.) That is a copy of the survey of Township Thirty (30) North, Range Seven (7) East, and the plan was approved July 11, 1883. It was made by the United States Surveyor-general, San Francisco, California—W. H. Brown. It is a

(Testimony of John C. Inge.)

copy of an official Government map. Patents of land in Lassen Park were granted in reference to that map and a patent contains a reference to that plat and survey as recommended to the General Land Office by the United States Surveyor-general. Section 2 of Township 30 North, Range 7 East, M. D. B. & M., according to the tract books of the United States Land Office, is within the Lassen National Forest and the records show that to be within the Lassen National Forest. This is the tract book, the official tract book of Township 30 North, Range 7 East, M. D. M., and shows the land was withdrawn November 22, 1902, and made permanent June 2, 1905. It is within the Lassen National Forest according to the map. The tract book is a part of the records of the United States Land Office in Sacramento. Page 121 is before me and so far as Section 2 is concerned there is nothing to read into the record [21] except that it is all forest lands and there are no entries under Section 2. This is the record of the former Susanville office. I do not know when it was completed. The original notations were made on this book. (Certified copy of field-notes of Sandow offered in evidence and were received and marked Government Exhibit No. 2.)

The *foregoing* is all the evidence introduced at the trial of the case by the defendant, Marble E. Burch:

TESTIMONY OF MARBLE E. BURCH, IN HIS OWN BEHALF.

MARBLE E. BURCH, the defendant, testified as follows:

I am the defendant in this matter and reside at Sylvan Lake in summer-time and in Chico in winter-time. I am familiar wth Lots Nos. 1 and 2, Section 30—I should say lots 3 and 4 in the South half of the Northwest Quarter of Section 1, Township 30 North, Range 7 East, M. D. & M. This instrument is the original from which my deed was issued to me when I bought the land and this is a copy of my deed from Cooper to myself, the people from whom I bought the land, George Cooper and Abbie Cooper, his wife, and when I said deed, I meant patent. (Patent marked Defendant's Exhibit "A" and deed marked Defendant's Exhibit "B.") I raised stock and the northwest corner of my land is right on the Lake and the Government proposed to build a road between my lot and the Lake. The corner was supposed to be a lost corner and we just kind of calculated, and we don't know just where we are at yet so far as my survey, and my fence is over on Section 1 at the present time, and my fence with reference to Sylvan Lake is on the east and west line to the proportionate corner that my surveyor has set in the Lake and the fence is between the lines now and is right on the true line.

(Testimony of Marble E. Burch.)

The fence is on the east and west line as near as I could build it. I purchased this land from John Cooper and he is the same man referred to in this patent from the United States. Mr. Cooper is dead, and he died some time in the summer of 1924. I built the fence the same year I bought the land and I built the fence on the east and west as near as I could to the corner that [22] Mr. Cooper had described, only I figured I kept on my side of the line and did not go on the Government land. When I bought the land I went to Mr. Cooper and asked him where the corner was—that corner on the Lake and he told me as near as he could to go to the outlet of the Lake and step ninety steps from the Lake and at a big fir snag that stood there and he told me that I could not miss it, that corner was practically on an old road. It is there; it has been well established and I would find the corner somewhere near that, within just a few feet between the outlet and this old snag and Mr. Cooper told me he had not been up there for several years; this old snag was probably burned down, it being the only hole left there with old fir roots in it and I found two stumps that correspond very well with the field-notes, where it looked as though somebody had cut the witness tree down and I took that to be the corner and that is what I took to be my corner and it is well identified there to be by Mr. Cooper as I had the Lake edge and the amount of steps and the road to work upon and had the field-notes which Mr. Durbin sent me.

(Testimony of Marble E. Burch.)

I checked with those field-notes, and they checked very close, starting at the corner of thirty-five and thirty-six, in the other Township, this being a standard parallel line, and I started in and it says this runs twenty-one chains and fifteen links to Sylvan Lake and the field notes read twenty chains and ninety-five links across a trail course, and on following this I followed an old blazed line that is there, and is there to-day, and it corresponded at twenty chains and seventy-five links. I crossed this old road, and at twenty-one chains and sixty-five links—he said he established a corner of these field-notes at twenty-one chains and fifteen links, whereupon on my running the line right there is right close to where I found the two old stumps, and there is a pile of rocks there, but, however, there is nothing left on them, any other trees there, or any rocks, with [23] any marks on them whatever, to identify that corner, and no other place there could I find a corner. Well, Mr. Cooper, told me as soon as he got well he would come up and show me where it was, and Mr. Cooper died, and therefore he never showed me exactly.

Mr. Cooper never did point out the corner on the ground to me. This stump I have testified to is practically right on the end of the neck of the Lake. It would be east-northeast, out on the land and from Mr. Seebecker's corner practically to the end of the fence—practically north of it.

I built a fence from about 200 *years* from the lake on the east and west line and after I built

(Testimony of Marble E. Burch.)

the fence a dispute arose between the forest service and me as to my line being between two known corners, and I checked that and found that my fence wasn't on the line according to those two corners. I was over the line a little, so I moved the fence back onto the line between thirty-five and thirty-six, the corner thirty-five and thirty-six and the quarter corner on the thirty-five on the south side. I run cattle and have lived in this vicinity since the spring of 1924 and use it as a summer home. Down in from the lake, maybe 500 yards, the lake was meandered, a fence around the lake there or swamp there; it is partly swamp and lake. I did not follow the line of the old fence. The old fence is quite a bit in the middle, just about 80 acres. Sixty acres fenced in of the 160 acres I bought and I ran a fence from it out to the line within 200 yards of Sylvan Lake, then I turned and ran straight to Sylvan Lake on that line as near as I could. It is fenced right up to the Lake and into the Lake a little bit. Cooper and his boys built the old fence. Cooper's land was not entirely fenced only about 60 acres in the middle and he just ran a fence around a meadow practically in the middle of this square and I bought 159.22 acres.

The Government made a demand on me in 1926 to take these fences down. It may have been in 1925. [24]

I have had experience in surveying, quite a little on retracing. I have been familiar with surveying for twenty years and know how to run courses and

(Testimony of Marble E. Burch.)

I have a general knowledge of surveying. I have been doing surveying quite a little for twenty years. This fence is on a true line between thirty-five and thirty-six and the quarter corner on the south side of thirty-five. It is on a line with Mr. Seebecker's survey and my lines correspond with his and I ran the line with fore and back sight with a compass. I did not step off ninety paces on getting that line. I just got a true line but when I marked my distance up there I measured that correctly and I think my measurements will check with all the others. I was guided by field-notes the same as our other copy.

I was not educated in surveying; what education I got I picked from the fields. I surveyed for Mr. Sam Stevens; also for Jim Stevens and *may* others there. I can use a transit but I did not use a transit because I was tracing corners. All I did was to retrace corners and give me a line. These field-notes are divided into two sections.

TESTIMONY OF ARTHUR BRAGT, FOR DEFENDANT.

ARTHUR BRAGT, a witness for the defendant, testified as follows:

I reside at Chico, California, and at the present time I am engaged in the mercantile business. I have a florist shop. My past occupation in business has been engineering work. I have been a surveyor for more than forty years. I was employed

(Testimony of Arthur Bragt.)

by Mr. Burch to make a survey of his property in Section 1, Township Thirty (30) North, Range Seven (7) East, known and which will be referred to as the property adjacent to Sylvan Lake. I used a certified copy of the field-notes of Mr. Sandow of the sixth standard parallel north. I also used a certified copy of the map of that township and I checked the courses and distances as given on that map with the field-notes here. [25]

In the first section of the field-notes reference is made to Sylvan Lake by a random line that runs west from the corner of sections thirty-five and thirty-six south on a random line. The first section of the notes ran on the sixth standard parallel or the subdivision of section one. In the other set of notes, subdivision of section one, the location of Sylvan Lake is not given. In the first section it gives the distances across the lake. The east and west line on his random line of Sixth Standard Parallel, that is, in retracing the Sixth Standard Parallel he runs a random line westward across Sylvan Lake and described as the distance across it by substraction from the two distances together.

From my survey I prepared a larger map showing this section. I prepared the map from my own survey in the field and from Sandow's field-notes. I checked the Sandow field-notes on the ground itself in June, 1926, and this map correctly expresses the position of the Sandow line, and in addition to that it shows the position of their line and the map is drawn to a scale and shows the pat-

(Testimony of Arthur Bragt.)

ented land of Mr. Burch and this map comprises the south half of the northwest quarter of lots three (3) and four (4) of Section One (1). (Map received in evidence and marked Defendant's Exhibit "C.") In connection with this map Exhibit "C" the dotted line leading from the corner of Sections thirty-five and thirty-six due west is the line described in Sandow's field-notes.

Running west from the common corner of thirty-five and thirty-six as identified by Mr. Sandow the distance of thirty-nine chains and sixteen links to a point north of the quarter-section corner that he found. It runs north a chain and fifty-two links. The random line intersects Sylvan Lake according to Mr. Sandow's note—the east bank of Sylvan Lake 22.65. [26]

I have a common corner of sections one and two —eleven and twelve marked on the map and the dotted line running north to the point marked with a circle is the location of a stone that is said to be the quarter corner of the west line of section one. I have a red line drawn to the right of that going in the northerly direction up to a point marked "Seebecker's Closing Corner." That is a line drawn from the field-notes of Mr. Carl Seebecker, who made the survey of this land in 1925. To the left or west is a line that may be drawn north to coincide with the closing corner as located by Sandow. We started out on a needle bearing taking the field-notes as given and went on a needle bearing and ran a traverse line, triangulating

(Testimony of Arthur Bragt.)

across Sylvan Lake and calculated the true course and distances between. Allowing for the variation I ran direct to the corner and ran what is called a true traverse. Our last course was direct to the corner and a true line between, figured from the traverse. It figured 79.3, which was the quarter corner of Section 35. I did not run the line according to the field-notes from the common corner of Section 35, the closing corners to Sections 1 and 2. I ran a line from a proportionate distance between the section corner and the quarter corner, and connected up with the quarter corner on the west line of Section 2. We searched diligently for the corner referred to by Mr. Sandow as being the corners of Sections 1 and 2 of Township 30 North, Range 7 East. I did not find one except to the one set in Sylvan Lake and referring to the Sandow notes we found no corner whatever, no closing corner or conclusive evidence of one. It has been my experience in establishing a lost corner to be bound by certain rules and regulations and the General Land Office of the United States puts out rules and regulations governing the making of resurveys and at any time there has been a resurvey made it is according to the rules and regulations of the General Land Office. There is [27] a rule of the General Land Office governing the restoration of lost or obliterated corners and those are the ones I have always followed in my practice and in making this survey I followed these rules and regulations and placed the corner of Sec-

(Testimony of Arthur Bragt.)

tions 1 and 2, twenty-one (21) chains and fifty (50) links on a line between the two corners and derived that point by the proportionate distance between the field-notes distance and the actual distance on the ground. There was some variation between the two distances. Reading on page 2, certified copy of Sandow's survey, from the south boundary line of Section 35, variation 17° 30′ east, the trail course is there. There is a road there. I struck the east bank of Sylvan Lake at a point between the two corners. It was approximately 21.15 chains. I noticed a bearing tree 42° east to distance marked. When Sandow started this line and on up, according to his notes, to a point one hundred fifty-two (152) links north of the quarter-section corner, he was on a random line. The course of this gravelled trail is directly south 87° 47′, and in the surveyor's language it means that it has varied from the west line by the difference between 90° and 87° 47′, or 2° 3′ on the west line, and that is his corrected notes as delineated on his map but not in his field-notes. When I refer to the map I refer to Exhibit 1, accompanying his field-notes, and I had a copy of it.

Burch's land on the map is the quarter-section corner right here and it was all Government land before the patent was issued. The contention is that there is a lost corner there and the re-establishment of that is what is governing in this case. I said that Sandow delineates that course on his map but does not give it correctly in his field-notes.

(Testimony of Arthur Bragt.)

The COURT.—Do you mean to say the map is incorrect?

Answer.—No. [28]

I followed the plat in determining the courses. There is no evidence of any correction as to distance. He assumes the same distance on that line that departs 2° 3′ on from the line he started, and there is not a corresponding correction of distance and the line would be about three links longer than the thirty-nine (39) chains, fifteen (15) links. I found a stone referred to by the field-notes of *bus*division one. In running the survey line west from the common section of thirty-five (35) and thirty-six (36) and north from the quarter-section corner and running the field-notes and taking into consideration the map or plat, I located that corner at a point twenty-one (21) chains fifty (50) links west or southwest or a little south of west of the section corner and pointing it out on the map it is a point twenty-one (21) chains fifty (50) links along this line, the red line, that is the line between the two points along that line and 36.39 from this corner. That is the closing corner and the proportionate distance and the closing corner that I found on the ground. The red line is pla*t*ed according to Seebecker's notes and the dotted line between the red and blue line is my line. The heavy line is the line projecting north from this quarter corner; taking it that he had made a mistake and he came north from there, assuming he did, that would be where it would throw out to.

(Testimony of Arthur Bragt.)

That particular corner is an iron stake and represents the closing corner of 1 and 2 according to my survey and that corner, with reference to Sylvan Lake, is out in the lake about thirty-five (35) links, and this line that runs south from that corner to the quarter section corner between 1 and 2 intersects the lake. It runs through the water there for a distance of two or three hundred feet. I made this location by the proportionate distance in proportion to the field-notes distance has to the actual distance, and it is derived by ratio. As the field-notes distance bears to the actual distance between, right to this—any part of that line, the field-notes distance for any part of that line bear to the actual distance. I first took into consideration the distance [29] between the section corner and a quarter-section corner of 34 and the quarter-section corner of 35, and the second distance, thirty-nine (39) chains, fifteen (15) links was the distance given in the field-notes, from the section corner of 35 to the quarter-section corner of 35. The third distance I took 31.15 is the closing distance in the field-notes and working that out in a ratio I wanted to find the proportionate measurement of the line between 35 to the closing corner of section 1, and working that out in a ratio that distance was twenty-one (21) chains and fifty (50) links.

The COURT.—According to this Exhibit 1, Sylvan Lake is not in Section One (1), is it?

(Testimony of Arthur Bragt.)

WITNESS.—We refuse to stipulate that it was.

The COURT.—I say it is not in there according to the map.

Answer.—No.

The COURT.—There is a reference to the map in your patent.

WITNESS.—Yes, sir.

The COURT.—You do not accept this plat as correct, do you?

WITNESS.—No, sir.

The COURT.—So far as this Court is concerned it is decisive of this case, it seems to me. There isn't any lost corner in there?

WITNESS.—There is a corner post there, but there is no—

The COURT.—According to this plat there is a corner.

WITNESS.—Yes, sir.

The COURT.—You say this map is wrong, Exhibit 1?

WITNESS.—By the field-notes, it is.

The COURT.—You say that is your conclusion. [30]

WITNESS.—An analysis of the field-notes shows it does not conform to the field-notes.

The COURT.—You must locate them according to this plat.

WITNESS.—That is what we are trying to do.

The COURT.—You are not doing it.

WITNESS.—Giving the courses and distances as

stated on the map I could run a line just like the one on the map.

Dated: September 27, 1929.

HUSTON, HUSTON & HUSTON,
PERCY NAPTON,
Attorneys for Defendant and Appellant.

It is hereby stipulated that the above and foregoing statement of evidence is true and correct and may be approved by the Judge without notice.

_____,
Attorney for Plaintiff. [31]

The above and foregoing is a full, true and correct copy of the evidence admitted at the trial of said suit.

Dated: ————, 1929.

_____,
Judge.

Due service hereby by copy admitted on this 27th day of Sept., 1929.

ALBERT E. SHEETS,
D.,
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 27, 1929. [32]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Hon. A. F. ST. SURE, United States District Judge of the Northern Division of the Northern District of California.

The above-named defendant Marble E. Burch feeling himself aggrieved by the decree made and entered in this cause on the 27th day of October, 1928, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of error which is filed herewith and he prays that his appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to said United States Circuit Court of Appeals, Ninth Circuit, sitting at the City of San Francisco, County of San Francisco, State of California, and your petitioner further prays that the proper order touching the security to be required by him to perfect his appeal be made.

HUSTON, HUSTON and HUSTON,
Solicitors for Appellant and Defendant. [33]

Service of the within petition by copy admitted this 25 day of Jan., 1929.

ALBERT E. SHEETS,
D.,
Attorney for Pltff.

[Endorsed]: Filed Jan. 25, 1929. [34]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the defendant in the above-entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 27th day of October, 1928.

I.

That the United States District Court in the Northern Division, Northern District of California, erred in overruling the motion of defendant and appellant that judgment be entered for defendant upon the ground that the plaintiff failed to prove the allegations of its bill of complaint.

Defendant's motion for judgment is as follows:

Mr. NAPTON.—At this time we ask that judgment be entered for defendant for the reason that they have not proven the allegations in their complaint. The burden in this case is upon the Government and I believe that on the pleadings the issue is whether or not this man's fence is upon the public domain or is upon land of the forest reserve, and the evidence does not show it at this time. I think there is a total failure of proof.

The COURT.—That is the only evidence before the Court right now. They say it is upon Government land. Motion denied.

Mr. NAPTON.—Exception. [35]

The following is all the evidence introduced by plaintiff in support of its bill of complaint.

W. G. DURBIN, a witness called upon behalf of the plaintiff, being duly sworn testified as follows:

I am the forest supervisor of the Lassen National Forest (witness shown map). That is a map of the recreational land laid out around Sylvan Lake by the Forest Service; that is in Township Thirty (30), Range Seven (7) and 31–7. The Government wishes to build a road around there; that is going from a point where the county road is built from the valley to the lake and then extending around in a southerly direction around the East side of Sylvan Lake. The map which was handed to me a moment ago is a recent map.

JOHN C. INGE, a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

I am Registrar of the United States Land Office, Sacramento, California. (Witness shown Government Exhibit 1.) That is a copy of the survey of Township Thirty (30) North, Range Seven (7) East, and the plan was approved July 11, 1883. It was made by the United States Surveyor-general, San Francisco, California—W. H. Brown. It is a copy of an official Government map. Patents of land in Lassen Park were granted in reference to that map and a patent contains a reference to that plat and survey as recommended to the General Land Office by the United States Surveyor-general.

Section 2 of township 30 North, Range 7 East, M. D. B. & M., according to the tract books of the United States Land Office, is within the Lassen National Forest and the records show that to be within the Lassen National Forest. This is the tract book, the official tract book of Township 30 North, Range 7 East, M. D. M., and shows the land was withdrawn November 22, 1902, and made permanent June 2, 1905. It is within the Lassen National Forest according to the map. The tract book is a part of the records of the United States Land office in Sacramento. Page 121 is before me and [36] so far as Section 2 is concerned there is nothing to read into the record except that it is all forest lands and there is no entries *except that it is all forest lands and there are no entries* under Section 2. This is the record of the former Susanville office. I do not known when it was completed. The original notations were made on this book. (Certified copy of field-notes of Sandow offered in evidence and were received and marked Government Exhibit No. 2.)

II.

There is no evidence to justify and support Findings Nos. 5, 6 and 7 in that the Court assumed as a matter of law that for the purposes of this suit the official plat, Plaintiff's Exhibit No. 1, was conclusive against the defendant in fixing and determining the boundaries of his land to the exclusion of the field-notes, Plaintiff's Exhibit No. 2, of the original survey upon which said plat was based.

III.

That the said map is erroneous as to the true location of Sylvan Lake.

IV.

The undisputed evidence respecting the boundaries of defendant's land discloses *at* the northwest corner of his land was lost and that there is a variance between two established corners of the original survey upon which defendant's patent is based and said map.

V.

That in the instan*ce* case it was the duty of the Court in fixing and determining the northwest corner of defendant's land to abide by the proportionate measurement as provided for and prescribed by the rules of survey of the Department of Interior General Land Office.

The following is all the evidence in support of the above findings.

MARBLE E. BURCH, defendant, testified as follows: I am the defendant in this matter and reside at Sylvan Lake in summer-time and [37] in Chico in winter-time. I am familiar with lots Nos. 1 and 2, Section 30—I should say lots 3 and 4 in the South half of the northwest quarter of Section 1, Township 30 North, Range 7 East, M. D. & M. This instrument is the original from which my deed was issued to me when I bought the land and that is a copy of my deed from Cooper to myself, the people from whom I bought the land, George Cooper and Abbie Cooper, his wife, and

when I said deed, I meant patent. (Patent marked Defendant's Exhibit "A" and deed marked Defendant's Exhibit "B.") I raised stock and the northwest corner of my land is right on the Lake and the Government purposes to build a road between my lot and the Lake. The corner was supposed to be a lost corner and we just kind of calculated and we don't know just where we are at yet so far as my survey, and my fence is over on Section 1 at the present time, and my fence with reference to Sylvan Lake is on the east and west line to the proportionate corner that my surveyor has set in the Lake and the fence is between the lanes now and is right on the true line.

The fence is on the east and west line as near as I could build it. I purchased this land from John Cooper and he is the same man referred to in this patent from the United States. Mr. Cooper is dead, and he died some time in the summer of 1924. I built the fence the same year I bought the land and I built the fence on the east and west as near as I could to the corner that Mr. Cooper had described, only I figured I kept on my side of the line and did not go on the Government land. When I bought the land I went to Mr. Cooper and asked him where the corner was—that corner on the Lake, and he told me as near as he could to go to the outlet of the Lake and step ninety steps from the Lake and at a big fir snag that stood there and he told me that I could not miss it, that corner was practically on an old road. It is there; it has been well established and I would find the [38] corner

somewhere near that, within just a few feet between the outlet and this old snag, and Mr. Cooper told me he had not been up there for several years; this old snag was probably burned down, it being the only hole left there with old fir roots in it and I found two stumps that correspond very well with the field-notes, where it looked as though somebody had cut the witness tree down and I took that to be the corner, and that is what I took to be my corner and it is well identified there to be by Mr. Cooper as I had the Lake edge and the amount of steps and the road to work upon and had the field-notes which Mr. Durbin sent me.

I checked with those field-notes, and they checked very close, starting at the corner of thirty-five and thirty-six, in the other Township, this being a standard parallel line, and I started in and it says this runs twenty-one chains and fifteen links to Sylvan Lake and the field-notes read twenty chains and ninety-five links across a trail course and on following this I followed an old blazed line that is there, and is there to-day, and it corresponded at twenty chains and seventy-five links. I crossed this old road, and at twenty-two chains and sixty-five links—he said he established a corner of these field-notes at twenty-one chains and fifteen links, whereupon on my running the line right there is right close to where I found the two old stumps, and there is a pile of rocks there, but, however, there is nothing left on them, any other trees there, or any rocks, with any marks on them whatever, to identify that corner, and no other place there could

I find a corner. Well, Mr. Cooper told me as soon as he got well he would come up and show me there it was, and Mr. Cooper died, and therefore he never showed me exactly.

Mr. Cooper never did point out the corner on the ground to me. This stump I have testified to is practically right on the end of the neck of the Lake. It would be east—northeast out on the land and from Mr. Seebecker's corner practically to the end of the fence—practically north of it. [39]

I built a fence from about 200 yards from the Lake on the east and west line and after I built the fence a dispute arose between the forest service and me as to my line being between two known corners and I checked that and found that my fence wasn't on the line according to those two corners. I was over the line a little so I moved the fence back on to the line between thirty-five and thirty-six, the corner thirty-five on the south side. I run cattle and have lived in this vicinity since the spring of 1924 and use it as a summer home. Down in from the lake, maybe 500 yards; the lake was meandered, a fence around the lake there or swamp there; it is partly swamp and lake. I did not follow the line of the old fence. The old fence is quite a bit in the middle; just about 80 acres. Sixty acres fenced in of the 160 acres I bought and I ran a fence from it out to the line within 200 yards of Sylvan Lake, then I turned and ran straight to Sylvan Lake on that line as near as I could. It is fenced right up to the Lake and into

the Lake a little bit. Cooper and his boys built the old fence. Cooper's land was not entirely fenced only about 60 acres in the middle and he just ran a fence around a meadow practically in the middle of this square and I bought 159.22 acres.

The Government made a demand on me in 1926 to take these fences down. It may have been in 1925.

I have had experience in surveying, quite a little on retracing. I have been familiar with surveying for twenty years and know how to run courses and I have a general knowledge of surveying. I have been doing surveying quite a little for twenty years. This fence is on a true line between thirty-five and thirty-six and the quarter corner on the south side of thirty-five. It is on a line with Mr. Seebecker's survey and my lines correspond with his and I ran the line with fore and back sight with a compass. I did not step off ninety paces on getting that line. I just got a true line but when [40] I marked my distance up there I measured that correctly and I think my measurements will check with all the others. I was guided by field-notes the same as our other copy.

I was not educated in surveying—what education I got I picked from the fields. I surveyed for Mr. Sam Stevens, also for Jim Stevens and many others there. I can use a transit but I did not use a transit because I was tracing corners. All I did was to retrace corners and give me a line. These field-notes are divided into two sections.

ARTHUR BRAGT, a witness for the defendant, testified as follows:

I reside at Chico, California, and at the present time I am engaged in the mercantile business. I have a florist shop. My past occupation in business has been engineering work. I have been a surveyor for more than forty years. I was employed by Mr. Burch to make a survey of his property in Section 1, Township Thirty (30) North, Range Seven (7) East, known and which will be referred to as the property adjacent to Sylvan Lake. I used a certified copy of the field-notes of Mr. Sandow of the sixth standard parallel north. I also used a certified copy of the map of that township and I checked the courses and distances as given on that map with the field-notes here.

In the first section of the field-notes reference is made to Sylvan Lake by a random line that runs west from the corner of sections thirty-five and thirty-six south on a random line. The first section of the notes ran on the sixth standard parallel or the subdivision of section one. In the other set of notes subdivision of section one the location of Sylvan Lake is not given. In the first section it gives the distance across the Lake. The east and west line on his random line of sixth standard parallel; that is, in retracing the sixth standard parallel he runs a random line westward across Sylvan Lake and described as the distance across it by subtraction from the two distances together. [41]

From my survey I prepared a larger map showing this section. I prepared the map from my own survey in the field and from Sandow's field-notes. I checked the Sandow field-notes on the ground itself in June, 1926, and this map correctly expresses the position of the Sandow line, and in addition to that it shows the position of their line and the map is drawn to a scale and shows the patented land of Mr. Burch, and this map comprises the south half of the northwest quarter of lots three (3) and four (4) of Section One (1). (Map received in evidence and marked Defendant's Exhibit "C.") In connection with this map, Exhibit "C," the dotted line leading from the corner of sections thirty-five and thirty-six due west is the line described in Sandow's field-notes.

Running west from the common corner of thirty-five and thirty-six as identified by Mr. Sandow the distance of thirty-nine chains and sixteen links to a point nor*t*y of the quarter-section corner that he found. It runs north a chain and fifty-two links. The random line intersects Sylvan Lake according to Mr. Sandow's note—the east bank of Sylvan Lake 22.65.

I have a common corner of sections one and two —eleven and twelve marked on the map and the dotted line running north to the point marked with a circle is the location of a stone that is said to be the quarter corner on the west line of section one. I have a red line drawn to the right of that going in the northerly direction up to a point marked "Seebecker's Closing Corner." That is a line

drawn from the field-notes of Mr. Carl Seebecker who made the survey of this land in 1925. To the left or west is a line that may be drawn north to coincide with the closing corner as located by Sandow. We started out on a needle bearing taking the field-notes as given and went on a needle bearing and ran a traverse line, triangulating across Sylvan Lake and calculated the true course and distances between. Allowing for the variation I ran direct to the corner and ran what is called a true traverse. Our last course was direct to [42] the corner and a true line between, figured from the traverse. It figured 79.3 which was the quarter corner of Section 35. I did not run the line according to the field-notes from the common corner of Section 35, the closing corners to Sections 1 and 2. I ran a line from a proportionate distance between the section corner and the quarter corner, and connected up with the quarter corner on the west line of Section 2. We searched diligently for the corner referred to by Mr. Sandow as being the corners of Sections 1 and 2 of Township 30 North, Range 7 East. I did not find one except the one set in Sylvan Lake and referring to the Sandow notes we found no corner whatever, no closing corner or conclusive evidence of one. It has been my experience in establishing a lost corner to be bound by certain rules and regulations and the General Land Office of the United States puts out rules and regulations governing the making of resurveys and at any time there has been a resurvey made it is according to the rules and regulations

of the General Land Office. There is a rule of the General Land Office governing the restoration of lost or obliterated corners. There are various sections there that bear on the restoration of lost and obliterated corners and those are the ones I have always followed in my practice, and in making this survey I followed these rules and regulations and placed the corner of sections 1 and 2, twenty-one (21) chains and fifty (50) links on a line between the two corners and derived that point by the proportionate distance between the field-notes distance and the actual distance on the ground. There was some variation between the two distances. Reading on page 2, certified copy of Sandow's survey, from the south boundary line of section 35, variation 17° 30′ east, the trail course is there. There is a road there. I struck the east bank of Sylvan Lake at a point between the two corners. It was approximately 21.15 chains. I noticed a bearing tree 42° east to distance marked. When Sandow started this line and on up, according to his notes, to a point one hundred fifty-two (152) links north of the quarter-section corner, he was on a random line. The course of this [43] gravelled trail is directly south 87° 47′, or 2° 3′ on the west line and that is his corrected notes as delineated on his map but not in his field-notes. When I refer to the map I refer to Exhibit 1, accompanying his field-notes, and I had a copy of it.

Burch's land on the map is the quarter-section corner right here and it was all Government land

before the patent was issued. The contention is that there is a lost corner there and the re-establishment of that is what is governing in this case. I said that Sandow delineates that course on his map but does not give it correctly in his field-notes.

The COURT.—Do you mean to say the map is incorrect.

Answer.—No.

I followed the plat in determining the courses. There is no evidence of any correction as to distance. He assumes the same distance on that line that departs 2° 3′ on from the line he started, and there is not a corresponding correction of distance and the line would be about three links longer than the thirty-nine (39) chains, fifteen (15) links. I found a stone referred to by the field-notes of subdivision one. In running the survey line west from the common section of thirty-five (35) and thirty-six (36) and north from the quarter-section corner and running the field-notes and taking into consideration the map or plat, I located that corner at a point twenty-one (21) chains fifty (50) links west or southwest or a little south of west of the section corner, and pointing it out on the map it is a point twenty-one (21) chains, fifty (50) links along this line, the red line; that is the line between the two points along that line and 36.39 from this corner. That is the closing corner and the proportionate distance and the closing corner that I found on the ground. The red line is plated according to Seebecker's notes and the dotted line between the red and blue line is my line. The heavy line is the line projecting north

from this quarter corner, taking it that he had made a mistake and he came north from there, assuming [44] he did, that would be where it would throw out to. That particular corner is an iron stake and represents the closing corner of 1 and 2 according to my survey and that corner, with reference to Sylvan Lake, is out in the lake about thirty-five (35) links, and this line that runs south from that corner to the quarter-section corner between 1 and 2 intersects the lake. It runs through the water there for a distance of two or three hundred feet. I made this location by the proportionate distance in proportion to the field-notes distance has to the actual distance, and it is derived by ratio. As the field-notes distance bears to the actual distance between, right to this—any part of that line, the field-notes distance for any part of that line bear to the actual distance. I first took into consideration the distance between the section corner and a quarter-section corner of 34 and the quarter-section corner of 35, and the second distance, thirty-nine (39) chains, fifteen (15) links, was the distance given in the field-notes, from the section corner of 35 to the quarter-section corner of 35. The third distance I took 31.15 is the closing distance in the field-notes and working that out in a ratio I wanted to find the proportionate measurement of the line between 35 to the closing corner of section 1, and working that out in a ratio that distance was twenty-one (21) chains and fifty (50) links.

The COURT.—According to this Exhibit 1 Sylvan Lake is not in Section one (1), is it?

WITNESS.—We refuse to stipulate that it was.

The COURT.—I say it is not in there according to the map.

Answer.—No.

The COURT.—There is a reference to the map in your patent.

WITNESS.—Yes, sir.

The COURT.—You do not accept this plat as correct, do you?

WITNESS.—No, sir.

The COURT.—So far as this Court is concerned it is decisive of this case, it seems to me. There isn't any lost corner in there? [45]

WITNESS.—There is a corner post there, but there is no—

The COURT.—According to this plat there is a corner.

WITNESS.—Yes, sir.

The COURT.—You say this map is wrong, Exhibit 1?

WITNESS.—By the field-notes, it is.

The COURT.—You say that is your conclusion.

WITNESS.—An analysis of the field-notes shows it does not conform to the field-notes.

The COURT.—You must locate them according to this plat.

WITNESS.—That is what we are trying to do.

The COURT.—You are not doing it.

WITNESS.—Giving the courses and distances as stated on the map I could run a line just like the one on the map.

Finding No. 5 reads as follows:

That the defendant, Marble E. Burch, has erected a fence and other improvements upon the Government land in Lot 1 of Section 2, Township 30 West, Range 7 East, M. D. M., between the east shore line of Silver Lake and the east section line of said Section 2 without permit or other authority from the complainant and has been and is now interfering with the construction of the aforesaid road.

Finding No. 6 reads as follows:

That the land of the defendant in the NW.¼ of Section 1, Township 30 North, Range 7 East, M. D. M., does not touch the shore line or embrace any portion of Silver Lake.

Finding No. 7 reads as follows:

That the position of the section line between Sections 1 and 2, Township 30 North, Range 7 East, M. D. M., is as shown on the official plat of survey of said Township and Range approved July 11, 1883, on file in the United States Land Office at Sacramento, California, a copy [46] of said plat being a part of the evidence in this cause.

NOTICE OF MOTION AND MOTION.

To the Plaintiff Above Named and to Its Attorneys, GEORGE A. HATFIELD and ALBERT E. SHEETS:

You and each of you will please take notice that at the courtroom of the above-mentioned court in the Federal Building, Sacramento, California, on Monday, the 15th day of October, 1928, at the hour of ten o'clock A. M., or as soon thereafter as counsel may be heard, the defendant will move the Court to

adopt, sign and file special findings of fact in lieu of the special findings heretofore made, a copy of which proposed special findings on the part of the defendant having been heretofore served upon you.

Said motion will be made on the ground that the special findings of fact heretofore made are not supported by the evidence and are contrary to law. Said motion will be based upon the records, papers and files and upon the proposed special findings aforesaid.

HUSTON, HUSTON & HUSTON,
Attorneys for Defendant.

The above motion was by the Court denied on the —— day of ————, 192—.

EXCEPTION TO SPECIAL FINDINGS OF FACT AND PROPOSED FINDINGS.

Now comes the defendant in the above-entitled action and excepts to the special findings of fact proposed by the plaintiff herein in that said findings of fact are not supported by any evidence and are contrary to law.

Defendant proposes the following special findings of fact and asks the Court to adopt, sign and file the same.

1. It is not true that the said defendant without permit or authority from the plaintiff, or the Secretary of Agriculture, or the District Forester, or without right or otherwise, or at all, has erected a fence upon and across the public domain described in Paragraph V of said complaint, or otherwise, or

at all, or that he has refused [47] or neglected to remove any fence erected on the public domain, but on the contrary the said fence referred to in said complaint is erected upon the lands of the said defendant; that said fence erected by said defendant on his own land does not now and never did obstruct or prevent the construction of any contemplated road over the public domain.

2. That at the time of the filing of the complaint, and at all times mentioned in the complaint and for a long time prior thereto, the defendant was and is the owner of, in possession of and entitled to the possession of Lots three (3) and four (4) and the South one-half (S.½) of the Northwest one-quarter (N. W.¼) of Section One (1), Township Thirty (30) North, Range Seven (7) East, M. D. M., and that the West and North boundaries of defendant's land embraces a portion of Silver Lake in the manner hereinafter mentioned, and in accordance with and in conformity to an official plat or survey of said township and range approved July 1883, on file in the United States Land Office at Sacramento, California, and in accordance with and in conformity to the field-notes of the original survey made by George Sandow, Public Surveyor, and which said field-notes are not on file in the office of the Public Survey at San Francisco, California, viz.: Beginning at the Southwest corner of Section One, Township Thirty North, Range Seven East, M. D. M., and thence running North on true line between Sections One (1) and Two (2), variation 18° 20′ E. at 23.00 chains. A small lake bears West 3 chains dis-

tant at 40.00 chains. Set a volcanic stone 16x7x6 inches marked one-quarter on W. face, ten inches deep for one-quarter section corner from which bears

Larch 12 ins. dia. N. 82° E. 57 lks.

Larch 11 ins. dis. N. 32° W. 52 lks.

Both marked ¼ S. B. T.

78.85 chains intersect 6th Standard N. 21.15 chs. S. 87° 47′ W. of corner to secs. 35, 36 T. 31 N. and set volcanic stone 15x14x8 ins. with 1 notch to E. and 5 to W. and marked C. C. on S., 10 ins. deep for closing corner to secs. 1, 2. [48]

3. It is not true that the lands enclosed by said fence and belonging to the said defendant have been or are now included within the boundaries of the Lassen National Forest, or any part thereof.

4. It is not true that defendant has erected a fence or any other improvements upon the Government land in Lot One (1) or Section Two (2), Township Thirty (30) North, Range Seven (7) East, M. D. M., between the East shore line of Silver Lake, and the East Section line of Section Two (2), without permit or authority from plaintiff, or otherwise or at all; it is not true that defendant has been or is now interfering with the construction of the road referred to in said complaint.

5. It is true that the land of the defendant in the Northwest one-quarter of Section One (1), Township Thirty (30) North, Range Seven (7) East, M. D. M., does touch the shore line and embrace a portion of Silver Lake; that the said fence heretofore constructed and now existing along the

shore line of said Silver Lake by said defendant was and is the true boundary line between the lands of the said defendant and the plaintiff.

6. That all of the lands now in the possession of said defendant and inclosed by said fence is owned by and is in the possession of said defendant and is not a part of the public domain and the said plaintiff has no right, title or interest therein.

CONCLUSIONS OF LAW.

The Court deduces the following conclusions of law from the foregoing findings of fact:

I.

That the plaintiff is entitled to take nothing by said complaint, and defendant is entitled to recover his costs herein.

II.

That the defendant was at the time of the filing of this complaint, and for a long time prior thereto and now is the owner of and in possession of the real property hereinbefore described.

Dated: ————, 1928.

————————————,

Judge. [49]

The exceptions to the special findings of fact and proposed findings on part of defendant bears the following endorsement: "Exceptions overruled—proposed findings disallowed.—A. F. St. Sure, D. J."

HUSTON, HUSTON and HUSTON,
Solicitors for Defendant and Appellant.

Service of the within assignment of errors by copy admitted this 25 day of January, 1929.

ALBERT E. SHEETS,
Attorney for Pltff.

[Endorsed]: Filed Jan. 25, 1929. [50]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The above-named defendant having on the 25th day of January, 1929, filed with the Clerk of the above-mentioned court his, defendant's, petition for appeal and praying therein that his appeal be allowed and that citation issue as provided by law and that a transcript of the records, proceedings and papers upon which the decree was based duly authenticated be sent to the United States Circuit Court of Appeals *of* the Ninth Circuit sitting at San Francisco, and that the proper order be made touching the security to be required to defendant of his appeal and required of him to perfect his appeal,—

NOW, THEREFORE, IT IS ORDERED AND DECREED that the petition of defendant praying that his appeal be allowed is this day granted and the appeal allowed upon defendant giving bond, condition as required by law in the sum of $300.00.

A. F. ST. SURE,
Judge.

Service admitted by receipt of copy Sept. 12, 1929.

ALBERT E. SHEETS,
D.,
Atty. for Pltff.

[Endorsed]: Filed Sept. 14, 1929. [51]

THE CENTURY INDEMNITY COMPANY,
Hartford, Connecticut.

KNOW ALL MEN BY THESE PRESENTS:

[Title of Court and Cause.]

UNDERTAKING ON APPEAL.

WHEREAS, lately at a regular term of the District Court of the United States for the Northern Division of the Northern District of California, sitting at Sacramento, California, in said District, in a suit pending in said court between the United States of America as plaintiff and Marble E. Burch as defendant, cause No. 253 in Equity, a final judgment was rendered and a decree had against the said defendant that the plaintiff was the owner of, entitled to the possession and occupancy of the land described in the bill of complaint situate in Section Two, Township Thirty North, Range Seven East, M. D. B. & M., and that the defendant is without any estate, right, title or interest in the above described land and that the defendant be forever enjoined and debarred from asserting any claim whatever in or to said land and that defendant be enjoined from maintaining a fence mentioned in

the bill of complaint or any other obstruction or improvement now existing on said land and that the defendant be enjoined from in any manner obstructing or interfering with the construction and completion of the road mentioned in the bill of complaint and that the plaintiff have and recover from the defendant all costs herein or therein and [52] that execution be issued therefor, and

WHEREAS the defendant filed a petition in said District Court praying that his appeal be allowed and that citation issue as provided by law and that a transcript of the records, proceedings and papers upon which said judgment or decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals, Ninth Circuit, sitting at the City of San Francisco, State of California, and

WHEREAS, on the 12th day of September, 1929, the petition for appeal was by the Judge of said District Court allowed,—

NOW, THEREFORE, for and in consideration of the premises and the sum of Ten Dollars ($10.00), receipt of which is hereby acknowledged, The Century Indemnity Company does hereby undertake and promise, and is here by these presents held and firmly bound unto the said plaintiff, its successors or assigns, to pay all damages and costs which may be awarded against the said appellant on the appeal, or on a dismissal thereof, not to exceed the sum of Three Hundred Dollars ($300.00), to which amount The Century Indemnity Company does hereby acknowledge itself bound.

The condition of this obligation is such that if the appellant shall prosecute his said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and effect.

It is expressly agreed by the said Century Indemnity Company that in case of a breach of any condition hereof, the above-entitled court may, upon notice to the surety of not less than ten (10) days, proceed summarily in the above-entitled suit in which this undertaking is given, to ascertain the amount which the surety is bound to pay on account of such breach, and render judgment therefor against the surety and award execution therefor as provided and in accordance with the intent and meaning of Rule No. 34 of the Rules of Practice of the United States District Court in and for the Northern District of California. [53]

IN WITNESS WHEREOF, the Century Indemnity Company has hereunto attached its corporate seal and affixed its name by its duly authorized attorney-in-fact at Sacramento, California, this 13th day of September, 1929.

THE CENTURY INDEMNITY COMPANY.

[Seal] By L. W. HERINGER,
Attorney-in-fact.

L. W. HERINGER.

State of California,
County of Sacramento,—ss.

On this 13th day of September, 1929, before me, Luda N. Cottle, a notary public in and for said

Sacramento County, residing therein duly commissioned and sworn, personally appeared L. W. Heringer, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of the Century Indemnity Company, and the said L. W. Heringer acknowledged to me that he subscribed the name of the Century Indemnity Company thereto as principal and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City of Sacramento, County of Sacramento, the day and year in this certificate first above written.

LUDA N. COTTLE,
Notary Public in and for said Sacramento County, State of California. [54]

[Endorsed]: Approved, Sept. 13, 1929.
A. F. ST. SURE,
D. J.

Filed Sep. 14, 1929. [55]

[Title of Court and Cause.]

MOTION TO DISMISS APPEAL.

Now comes the plaintiff and moves the Court to dismiss the appeal filed herein and for cause shows:

First. That said appeal was not allowed within six months from the filing of said final decree October 27, 1928.

Second. That no citation on appeal has been sued out nor served within six months from the filing of final decree October 27, 1928.

Third. That a transcript of the record has not been filed nor has the cause been docketed in the office of the Clerk of the Circuit Court of Appeals, Ninth Circuit.

Fourth. That no praecipe for transcript of record has been issued.

GEO. J. HATFIELD,
United States Attorney,
ALBERT E. SHEETS,
Assistant United States Attorney,
Attorneys for Plaintiff.

Receipt of the within —— by copy admitted this 12th day of August, 1929.

HUSTON, HUSTON & HUSTON,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 12, 1929. [56]

[Title of Court and Cause.]

NOTICE OF MOTION TO DISMISS.

To Marble E. Burch, the Defendant Above Named, and to Huston, Huston & Huston, Esqs., His Attorneys:

You will please take notice that the plaintiff in

the above-entitled action will on the 10th day of September, 1929, at 10 A. M. of said day or as soon thereafter as counsel can be heard, move the above-entitled court to call up and consider the motion to dismiss the appeal of the defendant in the above-entitled action.

That said motion will be made and based upon said motion and upon all of the records, papers, pleadings and files in said action.

Dated: August 12, 1929.

GEO. J. HATFIELD,
United States Attorney,
ALBERT E. SHEETS,
Assistant United States Attorney,
Attorneys for Plaintiff.

Due service of the within notice of motion to dismiss is hereby admitted this 12th day of August, 1929.

HUSTON, HUSTON & HUSTON,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 12, 1929. [57]

[Title of Court and Cause.]

ORDER TRANSFERRING EXHIBITS.

The defendant having on the 25th day of January, 1929, filed his petition appealing said suit to the United States Circuit Court of Appeals for the Ninth Circuit, and which petition was allowed on the 14th day of September, 1929, and the defendant

and appellant having given a bond on appeal, and which bond was approved on the 14th day of September, 1929,—

Now, therefore, on motion of Percy Napton and Huston, Huston & Huston, attorneys for defendant and appellant, the Clerk of the above-mentioned court is hereby directed to transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the following exhibits:

1. Plaintiff's Exhibit No. 1—Certified copy of original map upon which defendant's patent is based.

2. Plaintiff's Exhibit No. 2—Certified copy of field-notes of Sandow, the surveyor who made the map.

3. Defendant's Exhibit "A"—Certified copy of patent from the United States to Mr. Cooper.

4. Defendant's Exhibit "B"—Deed from John F. Cooper and Abbie Cooper to Marble E. Burch.

5. Defendant's Exhibit "C"—Map made by witness Bragt, a surveyor.

Dated: October 2, 1929.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Oct. 4, 1929. [58]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause, and to incorporate in such transcript of record:

1. Bill of complaint.
2. Answer to bill of complaint.
3. Final decree.
4. Defendant's motion to dismiss suit for failure of proof.
5. Ruling of Court on defendant's motion to dismiss suit.
6. Minutes of court of May 17, 1928.
7. Minute entry respecting the disposition of defendant's motion for dismissal.
8. Findings of fact and conclusions of law.
9. Exception to special findings.
10. Proposed findings on part of defendant.
11. Notice of motion and motion to adopt, sign and file special findings of fact on part of defendant in lieu of the special findings on part of plaintiff.
12. Ruling of Court on refusal of Court to adopt, sign and file special findings on part of defendant. [59]
13. Minute entry respecting the disposition of defendant's motion to adopt, sign and file special findings of fact proposed by defendant.

14. Assignment of errors.
15. Petition for appeal.
16. Order allowing appeal.
17. Bond on appeal.
18. Citation on appeal.
19. Praecipe for transcript of record.
20. Statement of evidence.
21. Admission of service of statement of evidence and notice of lodgment of statement of evidence, and notice of time fixed for the approval of said statement, and also notice of filing of praecipe for transcript of record.
22. Order of Court transferring all exhibits to the United States Circuit Court of Appeals for the Ninth Circuit.

Said transcript to be prepared as required by law and the Rules of the United States Supreme Court and of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and thereafter to be transmitted to said Circuit Court of Appeals in and for the Ninth Judicial Circuit of San Francisco, California, together with the original citation on appeal.

Dated: September 27, 1929.

HUSTON, HUSTON & HUSTON,
PERCY NAPTON,
Attorneys for Defendant and Appellant.

Due service hereof by copy admitted on this 27th day of Sept., 1929.

ALBERT E. SHEETS,
D.,
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 27, 1929. [60]

[Title of Court and Cause.]

ADDITIONAL PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please incorporate in the praecipe for transcript of record in the above-entitled cause, in addition to that requested by the defendant, the following:

1. Motion to dismiss appeal.
2. Notice of motion to dismiss appeal.

ALBERT E. SHEETS,
Assistant United States Attorney,
Attorney for Plaintiff.

Service of the within praecipe by receipt of copy thereof is admitted this 4th day of October, 1929.

HUSTON, HUSTON & HUSTON,
PERCY NAPTON,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 4, 1929. [61]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 61 pages, numbered from 1 to 61, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of United States of America vs. Marble E. Burch, No. 253—Equity, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipes for transcript on appeal, copies of which are embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Twenty-five and 85/100 ($25.85) Dollars, and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 11th day of November, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.

By F. M. Lampert,
Deputy Clerk. [62]

[Title of Court and Cause.]

CITATION.

United States of America to the Above-named Plaintiff and to Its Attorneys, GEORGE J. HATFIELD and ALBERT E. SHEETS:

You are hereby notified that in the above-entitled case in Equity in the Northern Division of the United States District Court for the Northern District of California, wherein the United States of America is complainant and Marble E. Burch is defendant, an appeal has been allowed the defendant, Marble E. Burch, to the United States Circuit Court of Appeals *of* the Ninth Circuit, sitting at the City of San Francisco, State of California, and you and each of you are hereby cited and admonished to be and appear in said court in the courtroom of the said District Court in the City of Sacramento, State of California, within thirty days (30) after the date of this citation, to show cause, if any there be, why the order and decree appealed from, should not be corrected and speedy justice done the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, Judge of the United States District Court for the Northern Division and the Northern District of California, this the 13th day of September, 1929.

A. F. ST. SURE,

Judge of the Northern Division of the United States District Court for the Northern District of California. [63]

Due service hereof by copy admitted on this 14 day of Sept., 1929.

ALBERT E. SHEETS,
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 14, 1929. [64]

[Endorsed]: No. 5985. United States Circuit Court of Appeals for the Ninth Circuit. Marble E. Burch, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed November 13, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5985

IN THE

United States
Circuit Court of Appeals

FOR THE

Ninth Circuit

MARBLE E. BURCH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief for Appellant

HUSTON, HUSTON AND HUSTON,
and PERCY NAPTON,
Woodland, California,
Attorneys for Appellant.

FILED
MAR 13 1931
F. D. MONCKTON,
CLERK

STATEMENT INDEX

Page

TABLE OF CASES AND AUTHORITIES CITED

IN THE

United States
Circuit Court of Appeals

FOR THE

Ninth Circuit

MARBLE E. BURCH,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

The names of the parties to this suit appear above and a brief statement of the facts in the pleadings is as follows:

Complainant alleges the residence of the appellant, Burch, within the territorial limits of the jurisdiction of the Northern Division of the United States District Court for the Northern District of California, Second Division.

That the appellee at all times mentioned in the Complaint was and is now the owner of all the Government lands embraced in Township 30 N., Range 7 E. M. D. & M., and also Section 2 in said Township, Range and Meridian.

That all the land aforesaid is situate in the Lassen National Forest in Lassen County, State of California, and Northern District thereof.

That by virtue of an Act of Congress the above described lands were during the year 1902 withdrawn as the Lassen Peak and Diamond Mountain Forest Reserves and were during the year 1907 included within the Lassen Peak National Forest and later within the Lassen National Forest and of which the said land at all times mentioned in the complaint were and now are a part of said Lassen National Forest.

That the appellee intends to build a road through Section 2 aforesaid on the east side of Silver Lake between the east bank or shore line of said lake and the east section line of said section and that Silver Lake is in Section 2 aforesaid.

That the appellant constructed a fence and maintains the same on the public domain over which the proposed road will be built and that his said fence interferes with the construction of the proposed road.

That the appellee is desirous of constructing said road at once, the same being necessary for the administration of the Lassen National Forest.

Appellee prays for an order of Court commanding that appellant remove his said fence and that he, his agents, et al., be perpetually enjoined from interfering with the construction of said proposed road.

ANSWER OF APPELLANT

The answer of the appellant admits that he resides within the territorial limits of the jurisdiction of the Court.

That appellee is the owner of Section 2, Township 30 N., Range 7 E., M. D. M., and that Section 2 is a part of the Lassen National Forest.

That appellee intends to build a road through Section 2 aforesaid on the east side of Silver Lake between the east bank or shore line of said Section 2, but in connection with his said admission, the appellant avers that the road as proposed will run over, upon and through appellant's land, namely Lots 3 and 4 and South one half of Northwest one quarter (S½ of NW¼) of Section 1, Township 30 N., Range 7 East M. D. M. containing 159.22 acres and concerning which land at all times mentioned in the complaint and for a long time prior thereto, he was and now is the owner of and in possession of.

Appellant denies that at the times mentioned in the complaint or at any other time or at all his said lands formed or form a part or parcel of any Government lands.

Appellant also denies that he constructed, maintained or maintains upon or across the public domain of the United States of America or upon or across any land or lands of forest Reserve or Reserve of the United States or upon or across any National Reserve or at all a fence or otherwise or at all.

In brief, appellant denies that he has constructed, maintained or maintains a fence upon any land of the appellee but instead the fence by him constructed and maintained is upon and across his land.

Appellant denies that his fence prevents or obstructs or will do so at any time, the building of the proposed road on part of appellee.

As to whether the appellee is desirous of constructing said road at once, or at any other time or at all, appellant has no knowledge, sufficient to enable him to answer the allegations, and basing his denial upon that ground denies the same.

To the Bill of Complaint the appellant interposed a Cross-Bill of Complaint wherein he sets forth the usual and ordinary allegations in a suit to quiet title to land.

Appellant concludes his Cross-complaint with the usual prayer respecting suits to quiet title.

In this suit the plain issue is, Is appellant's fence upon his own land or upon the land of the Government? In determining this homely question the west and north boundary lines of appellant's land become involved.

APPELLEE FAILED TO SUSTAIN THE BURDEN OF PROOF.

The burden of proving that appellant's fence is upon Government land rested upon the shoulders of the appellee throughout the trial of this suit.

This burden the appellee failed to sustain and in connection therewith, we invite the Court's attention to our first assignment of error. (Tr., page 39.)

APPELLANT'S MOTION FOR A JUDGMENT

At the conclusion of appellee's case the appellant moved the Court that a judgment be had in favor of appellant and in denying appellant's motion for a judgment we assert the Court committed error. (Tr., page 39.)

The appellant's motion is as follows:

> MR. NAPTON: At this time we ask that judgment be entered for defendant for the reason that they have not proven the allegations in their complaint. The burden in this case is upon the Government and I believe that on the pleadings the issue is whether or not this man's fence is upon the public domain or is upon land of the forest reserve, and the evidence does not show it at this time. I think there is a total failure of proof.
>
> THE COURT: That is the only evidence before the Court right now. They say it is upon Government land. Motion denied.
>
> MR. NAPTON: Exception. (Tr., page 39.)

APPELLEE'S PROOF

We will now proceed to discuss the substance of the proof upon which the appellee relies to sustain the burden imposed on it by its declaration.

Plaintiff introduced in evidence the map upon which defendant's title is based. (Plaintiff's Exhibit No. 1, Tr., 66.)

Plaintiff also introduced a certified copy of the Sandow Field Notes, and from which was prepared the much discussed map in this suit. (Plaintiff's Exhibit No. 2, Tr., 66.)

W. G. Durbin, a witness on behalf of appellee and the Forest Supervisor of the Lassen National Forest was shown a recent map of the recreational land laid around Sylvan Lake by the Forest Service in Township 30, Range 7 and 31-7.

He testified that the Government desired to build a road around the east side of said lake.

John C. Inge another witness for appellee, testified that he was the Registrar of the U. S. Land Office, Sacramento, California. He was shown appellee's Exhibit No. 1. He also testified that the survey of Township 30 N. Range 7 East, was approved July 11, 1883, made by the U. S. Surveyor General, San Francisco, California, and which was a copy of an official Government map and made by W. H. Brown, the Surveyor General, and that patents of land in Lassen Park were granted in reference to that map and a patent contains a reference to that plat and survey as recommended to the General Land Office by the U. S. Surveyor General and that Section 2, Township 30 N., Range 7 East, M. D. B. & M., according to the patent books of the U. S. Land Office is within the Lassen National Forest and the records show that to be within the Lassen National Forest. That the tract book concerning which he was testifying was the official tract book of Township 30 N., Range 7 E. M. D. B. & M., and shows the land was withdrawn November 22, 1902, and made permanent June 2, 1905.

It is within the Lassen National Forest according to the map, and the tract book is a part of the record of the U. S. Land Office in Sacramento, and that so far as Section 2 is concerned that it is all forest land no entries under it.

The appellee then introduced in evidence a certified copy of Field Notes of Sandow. (Exhibit No. 2, Tr., 66.)

The foregoing is the sum total of appellee's proof and upon which it relies to support the erroneous judg-

ment herein and by which it means and intends to take from appellant his right of ownership and possession in and to a certain portion of his land and as an incident thereto divest him of his right to a reasonable use of the water of Sylvan Lake for the purpose of watering his domestic animals and for other domestic purposes.

If this Court permits the erroneous judgment to stand said Judgment will, owing to its dualistic nature, deprive appellant of the two inherent rights by us discussed above.

The witnesses for appellee did not testify that appellant's fence was or is upon Government land or upon any part or portion thereof, and such a legal inference is not deducible from the documentary proof offered by plaintiff or through, or by means of any presumption set in motion by the evidence in this suit.

It is not and never was the contention of appellee that lying between Sections 1 and 2, Township 30 N., R. 7 East, M. D. B. & M., there is a fraction or a strip of vacant land upon which the appellant built and maintains a fence.

The aforesaid Sections are adjacent and it is not contended by the appellee that appellant constructed and maintains a fence upon land to which he intends or intended to acquire title.

The appellee alleges that the fence is upon Government land and the appellant defends against the allegation with the statement that the fence is upon his land and in the event of the Government building the proposed road, that is to say, on the east side of Silver

John C. Inge another witnes for appellee, testified at he was the Registrar of the U. S. Land Office, Sacmento, California. He was shwn appellee's Exhibit . 1. He also testified that th survey of Township N. Range 7 East, was approvd July 11, 1883, made the U. S. Surveyor General San Francisco, Calirnia, and which was a copy of n official Government ap and made by W. H. Brown, he Surveyor General, d that patents of land in Lasen Park were granted reference to that map and a patent contains a refence to that plat and survey a recommended to the neral Land Office by the U. S. Surveyor General and t Section 2, Township 30 N. Range 7 East, M. D. & M., according to the patet books of the U. S. nd Office is within the Lasse National Forest and records show that to be with the Lassen National rest. That the tract book coerning which he was tifying was the official tract book of Township 30 Range 7 E. M. D. B. & M., ad shows the land was thdrawn November 22, 1902, nd made permanent ne 2, 1905.

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ment herein and by which it means and intends to take from appellant his right of ownership and possession in and to a certain portion of his land and as an incident thereto divest him of his right to a reasonable use of the water of Sylvan Lake for the purpose of watering his domestic animals and for other domestic purposes.

If this Court permits the erroneous judgment to stand said Judgment will owing to its drastic nature, deprive appellant of the ... inherent rights by us discussed above.

The witnesses for appellee did not testify that appellant's fence was or is on Government land or upon any part or portion thereof, and such a legal inference is not deducible from the documentary proof offered by plaintiff or through, or by means of any presumption set in motion by the evidence in this suit.

It is not and never was the contention of appellee that lying between Sections 1 and 2, Township 36 N., R. 7 East, M. D. B. & M., there is a fraction or a strip of vacant land upon which the appellant built and maintains a fence.

The ... adjacent and ... appellee ... N¼ of ... M. D. M., ... any portion

Lake between the east bank or shore line of said Section 2, that the carrying out of such act on the part of appellee will carve a slice from his estate in fee and commence—as to the portion carved out—a new estate in the plaintiff.

The paper or documentary proof offered by appellee namely appellee's Exhibit 1, Tr., page 22, and Exhibit 2, Tr., page 24, fails to show at the time mentioned in the Bill of Complaint or at any other time or at all, appellant's land was or now is Government land, or a part or parcel of any land of the appellee, and the proof tendered by appellee fails to show that appellant's fence at the time mentioned in the complaint, or at any other time or at all, was or now is upon Government land.

APPELLANT'S PATENT

On the.....day of....., 19..... the appellee issued to Cooper, predecessor in interest of appellant, a patent to the land mentioned in appellant's answer and upon which land appellant built and maintains his fence.

In point of time the Cooper patent antedates Roosevelt's idea or proclamation reserving the forests of these United States for future generations, and prior in time—save perhaps Yellowstone National Park, the patent in this suit antedates the creation of National Parks in the United States.

The only direct proof in this suit bearing upon the true location of appellant's fence and the northwest corner of his land was that of appellant and his witness Bradt and for all purposes of this suit their testi-

mony must be taken as true and stands uncontradicted.

When all the evidence of this suit is considered it cannot be said of the appellant that at the times mentioned in the complaint or at any other time or at all he was or now is a trespasser upon the land of Uncle Sam because the evidence shows he constructed the fence and maintained the same upon land which he claims to be the owner of, and that in the construction of said fence he was guided by the declarations of his predecessors in interest.

In the event that this Court concludes that the fence of the appellant is upon the land of the Government, then in the light of the evidence and in view of the law in this case the only judgment which this Court can render is that the fence in dispute be destroyed and an injunction against its rebuilding be had, as is decided in case of U. S.—Douglas vs. Willan Satoris, 22 Pac. 92, (Wyo.).

In this connection we invite the Court's attention to appellant's testimony at page 43, Tr., wherein he alluded to the northwest corner of his land and its establishment by him in conformity to the declarations of his predecessor in interest and the original field notes upon which the Cooper patent is based and the plaintiff having proven nothing to the contrary we assert the appellant was entitled to a judgment in his favor and we think the rule of law enunciated in the well considered case of Halley vs. Harriman, 183 N. W. 665, applicable to the situation in this suit.

In the Halley case, *supra,* the Supreme Court of Nebraska held: "Where the proper location of

quarter corners of a section of land is disputed and defendant produces evidence tending to show the establishment of such corners by the Government Surveyor at points conforming to the field notes, and plaintiff produces no evidence of their location elsewhere, a verdict for defendant is sustained by the evidence and will not be disturbed."

We think it is proper to remark that the rule of law last aforesaid is so well known to this Court that it does not merit a further discussion.

The patent in this suit can be attacked upon one ground and upon one ground only, and that of fraud in its procurement and by means of this highest muniment of title appellant owns and is in possession of 159.22 acres of land bordering on and touching the shores of the lake which has been referred to interchangably as Sylvan or Silver Lake and the fact that it is a graceful, silvery body of water midst abundant forests and trees may be of great interest to appellee but such fact is a matter of small consequence to the appellant who absolutely needs the water of the lake for watering the livestock on his homestead and for other domestic purposes.

APPELLANT'S ASSIGNMENT OF ERRORS 2, 3, 4, AND 5.

As to our assignments of error, numbers 2, 3, 4, and 5 we purpose discussing them together.

We urge a clear mistake has been made by the trial Judge in his application of the rules of law when the Findings of Fact and Conclusions of Law in this suit

are considered and more in particular that error upon the trial Court's part in holding that, the tract, appellee's Exhibit No. 1, and upon which appellant's patent is based, was conclusive against the appellant in fixing and determining the northwest corner and the boundaries of appellant's land, and we think the true rule of law to be that the map and field notes are a part of the description of appellant's land and insofar as this legal dispute is concerned are depositions.

There is no substantial evidence to justify and support Findings Nos. 5, 6, and 7, which Findings are as follows:

FINDING NO. 5

(Tr., pages 13 and 14)

That the defendant, Marble E. Burch, has erected a fence and other improvements upon the Government land in Lot 1 of Section 2, Township 30 West, Range 7 East M. D. M. between the east shore line of Silver Lake and the east section line of said Section 21 without permit or other authority from the complainant and has been and is now interfering with the construction of the aforesaid road.

FINDING NO. 6

(Tr., page 14)

That the land of the defendant in the NW¼ of Section 1 Township 30 North, Range 7 East, M. D. M., does not touch the shore line or embrace any portion of Silver Lake.

FINDING NO. 7

(Tr., page 14)

That the position of the section line between Sections 1 and 2, Township 30 North, Range 7 East, M. D. M., is as shown on the official plat of survey of said Township and Range approved July 11, 1883, on file in the United States Land Office at Sacramento, California, a copy (46) of said plat being a part of the evidence in this cause.

It is discernable from the foregoing Findings that the trial court assumed as a matter of law that for the purposes of this suit, the official plat, appellee's Exhibit No. 1, was conclusive against appellant in fixing and determining the boundaries of his land and this in utter disregard of the original field notes upon which the plat or map is based and such a conclusion on the part of the trial court we maintain constitutes error.

MAP AND FIELD NOTES CONTROLLING IN FIXING THE BOUNDARIES OF APPELLANT'S LAND.

The original survey and the field notes respecting the same made by Deputy Surveyor George Sandow, in December, 1881, and from which field notes, the map was prepared and upon which the patent is based, are controlling elements in fixing the boundaries of appellant's land.

The much discussed map in this case was prepared in a Surveyor General's Office during the month of July in the year 1883, by a man named Brown the then United States Surveyor General for the State of Cali-

fornia and on this same map is a recital that the same was prepared in strict conformity with the field notes of the survey by Mr. George Sandow.

FIELD NOTES ARE A PART OF THE DESCRIPTION OF APPELLANT'S LAND.

In support of our contention that the field notes are a part of the description of the land called for by the patent and that the Court cannot make a finding in this case without considering the field notes, we cite the following authorities:

In the case of Foss vs. Johnson, 158 Cal. 128, the Supreme Court of this state held: "The reference in the patent to the official plat and survey make the plat and field notes of the survey a part of the description of the land granted as fully as if they were incorporated at length in the patent."

The above rule of law has been followed not only by the courts of this state but those of the United States in the following well considered cases:

Heath vs. Wallace, 138 U. S. 583;
Seward vs. Mallotte, 15 Cal. 306;
Powers vs. Jackson, 50 Cal. 429;
Cragan vs. Powell, 128 U. S. 691—32 L. Ed. 567;
Weaver vs. Howall, 171 Cal. 307;
Wilmon vs. Aros, 191 Cal. 80.

THE LOCATION OF THE NORTHWEST CORNER OF APPELLANT'S LAND A PRINCIPAL ISSUE.

Since one of the principal issues of fact is about the northwest corner of appellant's land and its location is

a vital question herein, we therefore direct the Court's attention to the testimony of the appellant, Marble E. Burch, pages 42 to 46, inclusive, Tr., which testimony in substance is as follows: That he, appellant, is familiar with the land of the Government set forth in the Bill of Complaint and appellant purchased his land from Cooper the patentee mentioned in the patent, Defendant's Exhibit No. A.

That the northwest corner of his land is right on the lake and that the Government intends to build a road between his lot and the lake and that the northwest corner of his land is supposed to be a lost corner.

That his fence is on Section 1, and that the same with reference to Sylvan Lake is on the east and west line to the proportionate corner that his surveyor set in the lake and the fence is between the lines now and is right on the true line and that he built his fence on the east and west line as near as he could build it.

That Cooper, the man from whom he purchased his land, died in 1924, and that defendant built his fence in that year and that he built his fence on the east and west as near as he could to the corner that Mr. Cooper had described and that in building his fence he figured he kept on his side of the line and did not go on Government land.

That when appellant bought the land from Cooper he asked Cooper where the corner was, that is the corner in the lake, and Cooper told him as near as he could and for appellant to go to the outlet of the lake and step ninety steps from the lake and that a big fir snag that stood there and Cooper told him that he could

not miss it and that the corner was practically on an old road.

That it is there—that it had been well established and that appellant would find that corner somewhere near that within just a few feet between the outlet and this old snag.

That Mr. Cooper told him, appellant, that he Cooper had not been up there for several years. Appellant also testified that the old snag was probably burned down, it being the only hole left there with old fir roots in it, and that he found two stumps that correspond very well with the field notes and it looked as though somebody had cut the witness tree down and that he took the two old stumps to be his corner as he, defendant, had the lake edge and the amount of steps and the road to work upon and also the field notes which Mr. Durbin sent him.

That he checked with those field notes and they checked very closely, starting at the corner of thirty-five and thirty-six in the other Township, this being a standard parallel line; he started in and it says this runs twenty-one chains and fifteen links to Sylvan Lake. The field notes read twenty chains and ninety-five links across a trail course and on following that he followed an old blazed line that was there, and is there today, and it corresponded at twenty chains and seventy-five links. That he crossed this old road, and at twenty-two chains and sixty-five links. Appellant also testified, "he said he established a corner of these field notes at twenty-one chains and fifteen links; where-

upon, on my running the line there is right close to where I found the two old stumps, and there is a pile of rocks there, but however, there is nothing left on the, any other trees there, or any rocks, with any marks on them whatever, to identify that corner, and no other place there he could find a corner." That Mr. Cooper told witness appellant, as soon as he got well he would come up and show witness where it was and Mr. Cooper died, and therefore he never showed witness exactly. That Mr. Cooper never did point out the corner on the ground to defendant and the stump testified to is practically right on the end of the neck of the lake. It would be east—northeast out on the land and from Mr. Seebecker's corner practically to the end of the fence—practically north of it.

That he, appellant, built a fence from about 200 yards from the lake on the east and west line and after he built the fence a dispute arose between the forest service and appellant as to his line being between two known corners and he checked that and found that his fence wasn't on the line according to those two corners, and that was over the line a little; so he moved the fence back on to the line between thirty-five and thirty-six, the corner thirty-five on the south side. That he runs cattle and has lived in this vicinity since the Spring of 1924, and uses it as a summer home. That down in the lake maybe 500 yards; the lake was meandered a fence around the lake there or swamp there; it is partly swamp and lake and that did not follow the line of the old fence; the old fence is quite a bit in the middle; just about 80 acres. Sixty acres fenced in of

the 160 acres which he bought and that he ran a fence from it out to the line within 200 yards of Sylvan Lake then he turned and ran straight to Sylvan Lake on that line as near as he could. It is fenced right up to the lake and into the lake a little bit. That Cooper and his boys built the old fence and Cooper's land was not entirely fenced only about 60 acres in the middle and he just ran a fence around a meadow practically in the middle of this square and that he, appellant, bought 159-22 acres.

That the Government made a demand on appellant in 1926 to take these fences down. It may have been in 1925.

That he had experience in surveying quite a little on retracing and he was familiar with surveying for twenty years and knows how to run courses and has a general knowledge of surveying, and has been doing surveying quite a little for twenty years. That his fence is on a true line between thirty-five and thirty-six and the quarter corner on the south side of thirty-five and it is on a line with Mr. Seebecker's survey and appellant's lines correspond with his and that he, witness and appellant, ran the lines with fore and back sight, with a compass. That he, appellant, did not step off ninety paces on getting that line, but got a true line and when he marked his distance up there he measured that correctly and thinks his measurements will check with all the others and he was guided by field notes the same as our other copy.

That he was not educated in surveying and what education he got he picked from the fields, and surveyed for Mr. Sam Stevens, also for Jim Stevens and

many others there. That he can use a transit, but he did not use a transit because he was tracing corners. All he did was to retrace corners and give him a line and testified that the field notes are divided into two sections.

APPELLANTS NORTHWEST CORNER LOST

From the testimony of the appellant Burch it is evident that the Northwest corner of his land is lost and the monuments establishing it cannot be found and in ascertaining the location of lost corners, lines and boundaries, Courts resort to the field notes of the original survey respecting public lands.

T. L. Wright Lumber Co., vs. Ripley County, 270 Mo. 121, 192 S. W. 996.

Even if the original field notes refer to Silver Lake or natural monument as controlling a course or a distance the law only resumes that the monument approaches accuracy within some reasonable distance and places the monument somewhere near where it really exists, but in this respect monuments are not unyielding in matters where boundaries are in dispute.

Security Land and Exploration Co. vs. Burns, 193 U. S. 167, 48 L. Ed. 662.

Monuments generally prevail over courses but courses prevail when monuments would defeat the deed, and the courses and distances enclose the land.

White vs. Luning, 93 U. S. 514, 23 L. Ed. 938.

When the course and distance of one side are missing the known line should be run: corners ascertained and a line run between the ends and closing the land.

McEwen vs. John Den, 24 How. 242, 16 L. Ed. 673.

DUTY OF COURT IF DIFFICULTY IS ENCOUNTERED IN RUNNING THE LINES OF THE SURVEY.

In fixing a lost corner the Court is not confined to the beginning corner of the original survey but can start from any one of the four points hereinbefore named and it is not necessary to follow the calls in the field notes as given, but if the Court can start from any one of the four points, and by doing so harmonize all the calls of the field notes, he may legally do so. In other words, if difficulty is encountered in running the lines of the survey, the Court is at liberty to run them in the reverse direction if it would result in harmonizing all the calls and objects of the patent.

Ayers vs. Watson, 137 U. S. 584, 34 L. Ed. 803.

"Field notes and the plat of Government surveys of record will control in ascertaining locations, even though the monuments established are gone."

Slovensky vs. O'Riley, 233 S. W. 478.

The *field notes* of the survey of public lands *are competent evidence* and have the force of a deposition.

Kirby vs. Lewis, 39 Fed. 67;

U. S. vs. Breward, 10 L. Ed. 916;

U. S. vs. Lowe, 10 L. Ed. 923;

United States vs. Hansen, 10 L. Ed. 937.

The field notes are presumptively correct and are *prima facie* evidence of the facts stated. They must be taken as true until disproved by a clear preponderance of the evidence.

Southern Development Co. vs. Endersen, 200 Fed. 276;

Johnson vs. Morris, 72 Fed. 897.

"The field and description notes of a survey form a part of the survey and are to be considered along with the patent."

Heath vs. Wallace, 34 L. Ed. 1065.

"When the question of a true location of a boundary line arises the field notes should be taken and from the courses and distances, natural monuments or objects and bearing trees described therein, the surveyor should, in order to fix the line precisely as it is called for by the field notes, retrace the steps of the man who made the original survey, and when so located it must control. The line as surveyed and described in the field notes is the description by which the Government sells it land."

County of Yolo vs. Nolan, 144 Cal. 445.

"Natural monuments and found corners, whether right or wrong, control over courses and distances as set forth in the field notes."

Mitchell vs. Hawkins, 189 N. W. 175;

Ogilvie vs. Copeland, 33 N. E. 1085;

Thompson vs. Darr, 298 S. W. 1;

Harrington vs. Boehmer, 134 Cal. 196.

"Where there is a conflict between the map and field notes as to the quantity of land in a patent the field notes control."

Stonewall Phosphate Co. vs. Peyton, 23 So. 440;

Miller vs. Grunsky, 141 Cal. 441;

Kane vs. Otty, 25 Oreg. 531 36 Pac. 537;

State vs. Board of Tide Land Appraisers, 32 Pac. 97.

"Where original monuments indicating corners of a survey have disappeared in absence of

evidence as to a location, plat, field notes and calls therein determine private rights as to disputed boundaries."

Galbraith vs. Parker, 153 Pac. 283.

The appellant in this action is the owner and entitled to possession of Lots 3 and 4 and the south half of the northwest quarter of Section One (1). One of the issues made by the pleadings in this case is—where are the West and North boundary lines of appellant's land? In order to locate and establish them it becomes necessary to resort to the field notes of the original survey of Mr. George Sandow. Deputy Sandow's survey of the Sixth Standard Parallel North, which is the boundary line between Township 30 and Township 31 North, Range 7 East, is the north boundary of defendant's property. His survey subdividing Township 30, more particularly referring to the line running North and South between Section 1 and Section 2 of Township 30 North, Range 7 East, is the West boundary line of defendant's land.

In the Sandow survey we established monuments at the following points:

1. Monument at the section corner of Sections 35 and 36, Township 31.

2. The quarter section corner of Section 35, Township 31 on the Sixth Standard Parallel.

3. The quarter section corner between Section 1 and Section 2 of Township 30.

4. The section corner of Section 1 and Section 2 on the Sixth Standard Parallel in Township 30.

These are the only monuments with which we are concerned, for in determining the location of the North

and West limits of the appellant's land, it is necessary to locate the monument at the section corner of Sections 1 and 2, said monument being on the Sixth Standard Parallel, and referred thereto in the field notes.

The proof introduced on behalf of the defendant bearing upon this point was that of Arthur Bradt, who testified that in surveying the appellant's land he located the following corners.

Corner No. 1. Section corner Sections 35 and 36.

Corner No. 2. Quarter Section corner of Section 35.

Corner No. 3. Quarter Section corner between Sections 1 and 2.

That he did not locate, nor could he find the monuments at the section corner of Sections 1 and 2, Township 30. The latter pont herein referred to as No. 4 is the point in dispute in this action. We therefore must use the monuments above referred to as a starting point by which we are to locate Point No. 4.

In order to picture this matter clearly before the Court we will resort to the use of the capital letter "T" and also the plat and field notes which are exhibits in this case and by means of the letter "T" and the map and field notes we purpose showing the court that the testimony of Bradt is not only pertinent to the issues but that the same does not tend to vary the original survey and was the best evidence before the court upon which a finding could have been made and based; Point No. 1 being the east end of the cross of the "T"; Point No. 2 being the west end of the cross of the "T"; Point No. 3 being the base of the line running north to the

cross of the "T". The point of intersection of that line with the cross of the "T" being the point in question.

Taking Mr. Sandow's field notes with reference to the courses and distances and variations from and to these monuments they are as follows: Starting from Point No. 1 Mr. Sandow ran a course 39.15 chains to a point 152 links north of Point No. 2 from which course he explains in his field notes that he calculated the true location of the line between 1 and 2 as follows: At the start of the line for the first half mile his variation is South 87° 47′ West. His field notes clearly show that he never made a survey of the true line between Points 1 and 2. The survey from points 3 to 4, his field notes call for the intersection of the above referred to cross of the "T" at a point 21.15 chains South 87° 47′ West of corner of Sections 35 and 36 which is referred to herein as Point No. 1. The said line running from Point No. 3 to Point No. 4 is North on true line between Sections 1 and 2 from the one-quarter corner to a point 21.15 chains South 87° 47′ West of the section corner of 35 and 36. Witness Bradt testified that he took the field notes and map of Deputy Sandow, and strictly following them he traced the courses as called for in the field notes and on the map, but he found the distance called for between Points One (1) and Two (2) greater than than that set forth in the field notes. The question then arises, what is the practice and custom governing this situation and what rules of law are applicable thereto?

Witness Bradt testified that in establishing lost corners, surveyors are governed by the rules and regulations of the United States Land Office, which have

been universally followed and adopted by the surveyors and the courts as the proper method for establishing lost corners and that the rule he followed in this case was the rule respecting the proportionate measurement on the location of Point No. 4 being the point in question, and that the rule of proportionate measurement is a rule of ratio as follows, to-wit: the actual distances as measured on the ground, bear to the distances as called for in the field notes, gives the location of the lost monuments. For example, the distances between Points 1 and 2 as actually measured is to the distances between Points 1 and 2, called for in the field notes, as the ratio of the distances called for in the field notes bears to the unknown distances to be determined by calculation. Following this well known rule Mr. Bradt established the closing corner of Section 1 at 21.30 chains South 87° 47′ West of Point No. 1, and in doing so carried out the rule prescribed by the General Land Office pertaining to Restoration of Lost or Obliterated Corners which rule is more fully set forth in that certain Government pamphlet issued by the General Land Office, Washington, D. C., dated July 1 1916 and in this connection we deem it applicable here to quote from Clark on Surveying and Boundaries, Edition of 1922 wherein at Sections 138 and 139 at pages 109 and 110 respectively he says:

Section 138. Re-establishment of meander corners. —In subdivision of sections made fractional by a body of water which was meandered, and along which meandered courses were established the surveyor will frequently find it necessary to re-establish lost or obliter-

ated meander corners. This is not always an easy matter, and, at best, uncertain, in the absence of evidence of those who had known the location of the corner before it was lost. To re-establish such lost corner the surveyor should first carefully chain "at least three of the section lines between known corners of the township within which the lost corner is to be relocated," say the instruction, "in order to establish the proportionate measurement to be used." In retracing such original lines the surveyor should ascertain the real course used by the original surveyor. If such surveyor reported meridianal lines as running due north and it is found that the average course of the three known lines is north 1 degree, and 10 minutes east, this course should be considered in restoring an extinct north line to a meander corner. These preliminary requirements must not be omitted, since they give the only data by which the fractional section line can be measured. "The missing meander corner will be re-established" continue the rules, "on the section or township line retraced in its original location, by proportionate measurement found by the preceding operations, from the nearest known corner on such township or section line, in accordance with the *requirements of the original field-notes or survey.*"

Section 139. Proportionate measurement more reliable than adjustment of chain.—The old practice required the surveyor to adjust his chain to suit the former measure, but recent instructions require the surveyor to pursue the "Proportionate measurement" practice. This will be found more desirable and more

accurate. It is seldom that the recent and former measurements will agree. Such differences occur in a variety of ways, such as using a chain too long or too short; the failure to level up in measuring an incline; by carelessness in setting pins; by failure to measure in a direct line or by an error in entering or transcribing the notes. The surveyor should avoid all of these errors in retracement as in the original survey. "By proportionate measurement of a part of a line is meant," the instructions say, "a measurement having the same ratio to that recorded in the original field-notes for that portion, as the length of the whole line by actual resurvey bears to its length as given in the record."

The following quotations from Tiedeman on Real property Section 832 we deem applicable to the situation confronting us in this case:

> "If therefore, the deed calls for a certain quarter section of a certain section in a certain township, a reference to the maps and field notes of the survey will determine the location of the land, for *maps* and *surveys* are generally proper evidence for the establishment of boundaries."
>
> "But in case of government or public lands as a general rule the Courts and the parties rely generally upon the surveys and plats returned by the Surveyor General for the evidence of boundary, and where the corners are lost, and cannot be established by parol evidence, the surveys and plats only give the courses and distance. If the surveys were accurate, and the courses and distances given in the field notes corresponded exactly with the actual location of the corners, a report to these courses and distances would do complete justice to all of the parties interested in the ascertainment of the boundary. *But as a matter of fact the chains used*

in making the measurements were stretched by constant use so that they were in most cases much longer than the standard chain, thus making the courses and distances call for less land than was actually included within the established corners."

"This statutory provision clearly makes the *field notes* the proper and the best means of ascertaining lost corners and the interpretation of the field notes must be governed largely, if not exclusively by the principles of civil engineering, the object being to ascertain the exact location of a lost corner, it is necessary, and the United States Statutes require it, that the errors in the measurements should be noted. *If, therefore, the courses and distances fall below the actual amount of land included in the two adjacent sections or subdivisions of sections between which the boundary is to be ascertained, the surplus of land should be divided between the two tracts of land in proportion to the respective lengths of their lines in the plats.*"

It therefore follows as a matter of surveying that the appellant's north and west boundary lnes should meet at a point 21.50 chains west of Point No. 1.

The map shows Silver Lake to be in Section 2. If by strictly following the field notes from the known monuments, defendant's boundary line intersected Silver Lake, what would be the legal result?

The trial court took the position that the only property which appellant is entitled to and taking into consideration the patent is that property only as delineated on the map, and that the north and west boundaries of appellant's property are controlled by said map and as a consequence appellant is not entitled to any portion of Silver Lake.

Then what is the position of Silver Lake respecting appellant's west boundary line, as called for by the field notes?

Witness Bradt testified that in surveying the north line of appellant's land and in following the notes and map and using all the courses and distances in strict conformity thereto and with the proportionate corner established by him to-wit: 21.50 chains west of Point No. 1 would be a point extending some 35 links into the Lake from the easterly shore line thereof. Furthermore, from his testimony, if the point was established according to Mr. Sandow's call, 21.15 chains, point No. 4 or the point of dispute would be approximately on the eastern shore line of the lake. Then, taking witness Bradt's statement respecting the disputed corner or point and comparing it to the field notes and the map of Deputy Sandow we direct the Court's attention to the original survey of Deputy Sandow. Deputy Sandow in running north of the true line (and he intersected the east shore of Silver Lake at a point 22.65 chains from Point No. 1 or the section corner of Section 35) notes in his survey that the shore line bears South and Northwest. That the quarter section corner of Section 35 being Point 2 herein is 152 links north of the true corner, and from that random course he calculated the true line. This survey shows that at the Point No. 4 he was actually some 30 or more feet north of the true corner.

It therefore follows that owing to the physical fact that the east bank of Silver Lake bears South and Northwest that if Sandow was on the true line he would

have encountered Silver Lake at a lesser distance from Point No. 1 than 22.65.

Witness Bradt testified that upon a careful examination of the field notes of Deputy Sandow and the map prepared therefrom that the course above mentioned is the only course in which Silver Lake is referred to, and that that line is the only line established by Deputy Sandow that shows the location of any portion of Silver Lake. A close examination of the field notes of Deputy Sandow and a close examination of the map itself will show that his statement is true. It will further reveal the fact that at the time the map was prepared there had never been a survey made of the meandering line of Silver Lake, its length, breadth or any survey showing its approximate shape; and furthermore that there was never a survey made prior to the patent of Cooper showing the location of Silver Lake with reference to the west boundary line of appellant's property. How then did Deputy Surveyor Sandow establish the west line of appellant's property? We are of the opinion that in doing so he adopted the rule discussed in the case of Hiller vs. Emerson, 122 Cal. 573, wherein this Court says: "Where the north line of a Government section is actually run to the northwest corner of the southwest quarter section located, the northwest quarter section corner is located by running a line due north from the northwest corner of the southwest quarter section until it intersects the north line and the point of intersection will be the true northwest corner." The field notes of Deputy Sandow clearly show that he resorted to the close rule in establishing

the west line because from Point No. 3 he ran a true line north to Point No. 4. He did not make a single reference as to any symbols, national monuments, blazed trees, or any call for distance to any intermediate points or point from which the locus of Point 4 might be determined. While Silver Lake was referred to as a natural monument in the survey of the Sixth Standard Parallel, but as to its being a natural monument as to any other point, or as to its being a controlling factor in this case in establishing the west line of defendant's land, there is not any evidence which would tend to show that it could be taken as such. Taking that one reference, how can this court determine its exact location with reference to our west boundary line, without the introduction of other evidence, and from the evidence introduced in the Court below will the same support a finding that Silver Lake was and now is of the size and contour as determined on the map, and by so doing jeopardize the property rights of the defendant?

If this be the law then the court could make a finding that each hill, the course of each stream, and the location of each depression, valley, swamp and lake as depicted on the map, actually exist in the location as shown on the map without any survey or testimony to substantiate their location.

The Court's attention is invited to the case of Harrington vs. Boehmer, 134 Cal. 196. In the Harrington case, *supra,* there was a discrepancy between the field notes and the plat prepared therefrom and the Supreme Court of California held "In case of a discrep-

ancy between the field notes and the plat, the plat must give way to the field notes and the Land Department may properly correct the plat so as to conform to the field notes." It further decided that where the field notes gave certain lands to the defendant and the map showed the title to certain lands to be in the plaintiffs, and the field notes show that there is no such land in existence, as set forth on the map, then the field notes govern and the property belongs to defendant, regardless of what the map depicted.

Even though this court may be of the opinion that the appellant is not entitled to establish his northwest corner by the proportionate measure, nevertheless, his boundaries must strictly conform to the field notes, and he is then nevertheless entitled to such portion of Silver Lake that might be intersected by his west boundary line after said Point No. 4 has been located in accordance with either of the above holdings. As to the location of Silver Lake in strict conformity with the field notes and the map, we are bound thereby insofar as the field notes and the map agree and as to any portion of the map not borne out by the field notes and which does not strictly conform thereto or does depict something not contained in the field notes, we are not bound thereby, nor can appellant's rights be jeopardized by that portion.

Harrington vs. Boehmer, supra.

Witness Bradt testified as to the location of Silver Lake with reference to our West and North boundaries and his testimony is hereinbefore discussed.

In the case of Staiden vs. Helin, 79 N. W. 537,—"The testimony of eye witnesses as to the location of lost corners is admissible for the purpose of proving their location."

Therefore appellant's evidence supports the field notes of Deputy Sandow, together with evidence of matters not referred to in the field notes even though it contradicts the map. And accordingly appellant's boundaries must be run straight between points regardless of their effect on Silver Lake, and furthermore the survey upon which the map is based did not even refer to the location of Silver Lake, in connection with the establishing of appellant's west boundary line.

In conclusion the main question before this Court is, whether the map often alluded to herein is conclusive against the appellant respecting the boundaries of his land. The Judge who presided at the trial of this case in the Lower Court assumed for all purposes and decisive of all the issues framed by the pleadings that the map was the best evidence. However, we urge that he was wrong in the assumption and that his findings and decree are against law for all the reasons hereinbefore argued and cannot be reconciled with the authorities which hold that the map and field notes are depositions in this case and part of the description of appellant's land.

We respectfully urge that the decree in this suit should be reversed.

HUSTON, HUSTON and HUSTON
and PERCY NAPTON,
Attorneys for Defendant and Appellant.

No. 5985

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

MARBLE E. BURCH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

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Neal, Stratford & Kerr, S. F.

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TABLE OF CASES

No. 5985

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

MARBLE E. BURCH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

JURISDICTION

This is an appeal from a judgment based upon special findings of the United States District Court at Sacramento, California, Judge A. F. St. Sure, presiding, enjoining defendant from interfering with the building of a road on Government land in Section 2, T. 30 N., R. 7 E., M. D. M., and requiring appellant to remove fences and other improvements placed by him thereon and finding that the Government is entitled to the ownership, possession and occupancy of the land in controversy.

Question Presented

Appellant enumerates six specifications of error which have been narrowed and regrouped as follows:

1. That the Court erred in denying appellant's motion for judgment at the conclusion of the Government's case in chief based upon the insufficiency of the evidence (Record p. 39, Spec. 1).

2. That the official Land Office survey plat (plaintiff's Exhibit 1) is erroneous, but the Court erroneously assumed it to be correct as a matter of law in fixing the northwest corner of defendant's land which corner is lost or obliterated instead of fixing the same by proportionate measurement (Record p. 41, 42, Spec. 2, 3, 4, 5).

Statement of Case

The Government is the owner of the land in Section 2, T. 30 N., R. 7 E., M. D. M., shown on the official Land Office survey plat. The appellant is the owner of the NW¼ of Section 1 in this township. The strip of land in controversy lies between the east shore line of Silver Lake and the east line of Section 2 which is the west boundary of appellant's land as shown on said plat. The appellant contends that the northwest corner of his land has been lost or obliterated and that therefore he is entitled to re-establish this corner by proportionate measurement which procedure will place the corner in Silver Lake and deprive the Government of the strip of land above mentioned and as shown on the official plat. The Forest Supervisor has established a summer home recreation area on the shores of Silver Lake and proposes to build a road on the strip of land in controversy to these recreation sites. The appellant has built a fence and other improvements

on this strip of land and refuses to vacate so that the road may be built. The Government therefore brought this injunction suit to restrain the defendant and appellant from interference and requiring him to remove all his improvements from the strip of land in order that the Government may proceed with the building of this road.

Summary of Argument

1. The error if any in denying the appellant's motion for judgment at the conclusion of the plaintiff's case in chief was cured by the testimony introduced as appellant's case in chief, but defendant's answer (Record p. 5, 7) expressly by affirmative allegation admits this point.

2. The Court properly disregarded the theoretical proportionate measurement evidence of appellant and in lieu thereof accepted the evidence which retraced the actual survey and corner location in dispute as made by the original surveyor.

ARGUMENT

I

THAT THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT AT THE CONCLUSION OF THE GOVERNMENT'S CASE IN CHIEF BASED UPON THE INSUFFICIENCY OF THE EVIDENCE (RECORD p. 39, SPEC. 1).

This is a case in equity and not one at law. Nevertheless the motion for judgment at the conclusion of the plaintiff's case in chief corresponds to a motion for non-suit. This Court in *Cook et al. v. Klonos et al,* 164 Fed. 529, held:

> "A motion by the defendant at the close of plaintiff's case to dismiss a suit of an equitable nature on the ground that plaintiff has failed to make a prima facie case, under Code Civ. Proc. Alaska, Sec. 378 (Act June 5, 1900, c. 786, 31 Stat. 395), which authorizes the dismissal of such a suit whenever upon the trial it is determined that the plaintiff is not entitled to the relief claimed, or any part thereof, like a motion in an action at law for a nonsuit or direction of a verdict on the same ground, admits every fact which the evidence proves, or tends to prove, as well as the facts which may naturally and rationally be inferred from the facts proved."

However that may be the defendant chose not to rely on this motion for judgment after the plaintiff rested but proceeded to put on his own case, and in doing so supplied the defect in plaintiff's testimony if such existed. It is well settled in California at least that under such circumstances the defendant has waived the error or rendered the error harmless.

> "An error in denying a motion for non-suit is harmless where the defect in the plaintiff's testimony is subsequently supplied by the evidence of the defendant."
>
> *Appeal and Error* 2 Cal. Jur. Sec. 610 p. 1025
>
> "If a plaintiff is allowed to open his case for further evidence and supplies the omitted proof, any error in denying a non-suit is harmless. So also where a defendant does not stand on his motion made at the close of a plaintiff's case and afterwards introduces evidence supplying defects in plaintiff's proof, he thereby waives or cures any error in overruling his motion or at least renders any error in denying the motion harmless."
>
> *Dismissal and Non-Suit* 9 Cal. Jur. Sec. 39 p. 564

Appellant states in his brief (p. 7):

> "The witnesses for appellee did not testify that appellant's fence was or is upon Government land or upon any part or portion thereof, and such a legal inference is not deducible from the documentary proof offered by plaintiff or through, or by means of any presumption set in motion by the evidence in this suit."

Paragraph II of the bill is as follows (Record p. 2):

> "II. That the United States is now and has been at all times herein mentioned the owner of all of the Government lands embraced in Township 30 N., Range 7 E., M. D. M., and more particularly of Section 2 in said township and range as delineated and described on the plat of survey officially approved by the General Land Office and the Department of the Interior, all situated within the exterior boundaries of the Lassen National Forest in Lassen County, State and Northern District of California."

It will be observed that the Government claims title to Section 2, Township 30 N., Range 7 E., M. D. M., as delineated on the official plat of survey approved by the General Land Office and the Department of the Interior. This plat of survey was introduced in evidence as Plaintiff's Exhibit No. 1. As delineated on this plat Silver Lake is entirely in Section 2 with the exception of some small area in Section 35, Township 31 N., Range 7 E., M. D. M. The closing corner (the one in controversy here) the northeast corner of Section 2, is not at or in the Lake and the line between Sections 1 and 2 at no place touches or enters the Lake. As testified by W. G. Durbin (Record p. 23), the Government desires to build a road on the east side of Silver Lake between the Lake and the section line.

The defendant answered the bill and admitted the allegations of Paragraph I, II and III (Record p. 5).

It would seem that by thus admitting the allegations in Paragraph II of the bill, the appellant has admitted that there is Government land between the east shore line of Silver Lake and the east line of Section 2, and that the closing corner (northeast corner of Section 2) does not lie nor ever did lie in the Lake or that the east line of Section 2 touched or intersected the shore line of Silver Lake.

In his answer (Record p. 5) appellant avers in answering Paragraph IV of the bill that the road proposed to be built by the Government will run through and be constructed over the land of the defendant in Section 1. Since the Government alleged in Paragraph IV of the bill (Record p. 3) that the road was to be built between the east side of Silver Lake and the east line of Section 2, the defendant admits that this is the strip he claims. In Paragraph III of his answer (Record p. 6, 7) appellant admits that he has built a fence on the strip of land in controversy and claims ownership of the land.

The appellant contends that no proof was offered by the Government witnesses that appellant's fence was on Government land. Since the appellant after the denial of the motion for judgment put on his case, he waived any error in the denial of this motion, if he supplied the proof which he alleges is lacking in the appellee's case in chief.

The defendant and appellant testified that his fence is on the line to the proportionate corner set by his

surveyor in the Lake (Record p. 25); that he figured he kept on his side of the line and did not go on Government land; (Record p. 26) that Cooper, the previous owner had told him to go to the outlet of the Lake and step ninety steps from the Lake and the corner was practically on an old road; (Record p. 26) that the Government made a demand on him in 1925 or 1926 to take the fences down. (Record p. 28); that he did not step off ninety paces on getting that line. (Record p. 29).

The appellant states that his fence is on a line to a corner set by his surveyor in Silver Lake and also that the Government demanded the removal of the fence in 1925 or 1926. By so testifying he admitted that his fence was on land claimed by the Government on the east side of Silver Lake between the Lake and the closing corner (northeast corner of Section 2). He also admits that he did not follow the instructions given him by Cooper, who practically told him that the corner in controversy was not in the Lake but at or on an old road.

Appellant in his brief says (Brief p. 8):

> "The paper or documentary proof offered by appellee namely appellee's exhibit 1, Tr., page 22, and Exhibit 2, Tr., page 24, fails to show at the time mentioned in the Bill of Complaint or at any other time or at all, appellant's land was or now is Government land, or a part or parcel of any land of the appellee."

The plat of survey (plaintiff's Exhibit 1) discloses that the Government owns land between the east line of the Lake and the east line of Lot 1, Section 2, and

that the Lake does not touch any part of Section 1, the closing corner (northeast corner section 2) being clearly removed from the Lake. Appellant's patent embraces the Northwest Quarter of Section 1. Therefore according to this plat which the appellant admits in his answer, there is no conflict between appellant's land and the land of the United States. The trouble arises from the fact that the appellee refuses to abide by this plat which is incorporated in his patent and insists on building his fences to a supposed corner in Silver Lake thus encroaching upon the Government land as delineated on Plaintiff's Exhibit No. 1.

Appellant contends (Brief p. 9) that the only relief that can be granted is a judgment that the fence in dispute be destroyed and an injunction against its rebuilding be had.

The Bill of the United States asks for an injunction for removal of the fence or any other obstruction or improvement and to restain the defendant from interfering with the construction of the road on the east side of Silver Lake. The United States further prays for such further relief as equity may require and that the Court may deem meet.

This Court said in *Cooper vs. United States,* 220 Fed. 867, 870:

> "Now, under the facts distinctly stated in the bill and the answers of the defendants, and the issues naturally growing out of such facts, the relief accorded the government was plainly within the prayer for general relief, although not within any specific demand. This, under the authorities, will support the decree."

> "If a bill states a cause of action entitling the plaintiff to equitable relief on any theory of the case, a court may grant it under a prayer for general relief, notwithstanding other specific relief may be mistakenly prayed for."
>
> *Young & Vann Supply Co. vs. Gulf Ry. Co.,* 5 Fed. (2d) 421, 423.

It is elementary that when a court of equity has jurisdiction it will give complete relief and make a final determination of all matters in controversy embraced within the pleadings.

> "When jurisdiction in equity has properly attached, it extends to the whole case and to all the issues involved, and the court will proceed to determine any other equities existing between the parties connected with the main subject of the suit and give all relief requisite to the entire adjustment of such subject, provided it is authorized by the pleadings."
>
> *Central R. Co. v. Jersey City et al,* 199 Fed 237.
> *Electric Boat Co. vs Lake Torpedo Boat Co.,* 215 Fed. 377.
> *In re Blake,* 150 Fed. 279.

This Court held in *Chanslor-Canfield Oil Co. vs United States,* 166 Fed. 145:

> "Where the legal title to an oil placer mining claim remains in the United States, but defendants, wrongfully as claimed, are in possession and extracting the oil therefrom, equity has jurisdiction of a suit to stop the waste, and having done so, under equity rule 23, will determine the right to possession and grant appropriate relief."

Therefore the Court had full power to determine and adjudicate all questions before it including the right of possession and title and is not restricted to the granting of merely injunctive relief.

Appellant cites the case (Brief p. 9) of *Halley vs Harriman,* 183 N. W. 665, which embraces a situation not existing in the present case. Appellant assumes that no evidence has been introduced by appellee as to the location of the northeast corner of Section 2, overlooking the fact that Plaintiff's Exhibits Nos. 1 and 2 definitely place this corner at a location entirely different from the point selected by appellant.

Appellant argues that his patent can be attacked on only one ground namely fraud, and that he is the owner of 159.22 acres of land bordering on and touching Silver Lake.

This is not a suit for cancellation of patent and the appellee is not attacking the patent or seeking to have it set aside. The vital question here involved is one of boundary. Appellant's claim to land bordering on Silver Lake contrary to the official plat and field notes, and his interference with a legitimate Government activity, precipitated this suit.

II

THAT THE OFFICIAL LAND OFFICE SURVEY PLAT (PLAINTIFF'S EXHIBIT 1) IS ERRONEOUS, BUT THE COURT ERRONEOUSLY ASSUMED IT TO BE CORRECT AS A MATTER OF LAW IN FIXING THE NORTHWEST CORNER OF DEFENDANT'S LAND WHICH CORNER IS LOST OR OBLITERATED INSTEAD OF FIXING THE SAME BY PROPORTIONATE MEASUREMENT (RECORD p. 41, 42, SPEC. 2, 3, 4, 5).

Appellant in grouping and discussing his assignment of errors 2, 3, 4 and 5 contends (Brief p. 12) that the trial court assumed as a matter of law the official plat was conclusive against appellant in utter

disregard of the original field notes. This contention is believed to be unfounded.

The findings and decree of the court were based on the entire evidence submitted not exclusively upon the official plat. As will be shown, the evidence supports and justifies the findings and decree.

> "The findings of the trial court, on matters in dispute, are presumptively correct, even in equity."
>
> *U. S. vs Board of Missions,* 37 Fed. (2d) 272
>
> "Though on an appeal in an equity suit the evidence is reviewed *de novo,* nevertheless findings of chancellor are presumptively correct, and should be accepted unless a serious mistake had been made in consideration of the evidence."
>
> *New York Life Ins. Co. vs Griffith,*
> 35 Fed. (2d) 945

We agree with the rules laid down in the cases quoted from and cited in appellant's brief page 13. These rules are well known but we do not agree with appellant's application of these rules to the evidence in this case.

The question in this case is the location of the west line of Section 1, T. 30 N., R. 7 E., M. D. M., and the closing corner to Sections 1 and 2 in this township on the Standard Parallel. The defendant contends that this line cuts Silver Lake and that the proper location of the closing corner is in the Lake.

The defendant's surveyor, Bragdt, placed this corner out in the Lake about 35 links or 23 feet, arbitrarily using the proportional method in relocation and running the line 300 feet through the water in spite of

the evidence before him as to the true location of this corner.

The official plat in evidence in this case clearly shows that Silver Lake is entirely in Section 2, T. 30 N., R. 7 E., with some small area in Section 35, T. 31 N., R. 7 E., M. D. M. The closing corner between Sections 1 and 2, T. 30 N., R. 7 E., is not at or in the Lake and the line between these Sections at no place touches or enters the Lake.

Sandow's field notes gives the distance to Silver Lake from the corner of Section 35, T. 31 N., R. 7 E., as 22.65 chains and places the closing corner to Sections 1 and 2 at 21.15 chains from the corner of Sec. 35 this places the closing corner 1.5 chains east of the Lake. As indicated by the notes, these distances were on the true line between the section corner of Section 35 and the quarter corner on the south line of Section 35, and not on the random line. In running the line north between Sections 1 and 2 Sandow did not intersect the shore line of Silver Lake. It will be observed that in running west from the corner of Section 35 he *mentions* intersecting the shore line of Silver Lake at 22.65 chains. Furthermore, in setting the closing corner he marked two witness trees of larch which is also called lodge pole pine. Sandow's notes are particularly significant at this point where he says "From which bears a larch 5 ins. dia. S. 62° W 9 links." This places one of the witness trees about 6 feet southwest of the corner and between that corner and Silver Lake.

Now if Sandow placed the closing corner in the Lake, certainly he would not have had witness trees, one of

which is between the corner and the Lake, and furthermore he could have had no witness trees at all in the position he notes. If the corner had been on the water line of the Lake he could not have had a witness tree S. 62° W 9 links since in that case the tree would have been in the water where trees do not grow. In addition, if the corner had been at or in the Lake Sandow in running the line north between Section 1 and 2 would have been obliged to touch or intersect the shore line. There is nothing in his notes showing this to be the case.

It will also be noted that when Sandow's line on the north from the corner of Section 35 intersected the shore line of Silver Lake at 22.65 chains, he states that the Lake bears *south* and *northwest*. In order for the Lake shore to touch or intersect the section line between Sections 1 and 2, the bearing of the Lake would have to be *southeast* instead of *south*. The distance at the Lake between the random line and the true line is between 30 and 40 feet and if the bearing of the Lake had changed from *south* to *southeast* within so short a distance Sandow would certainly have mentioned it in his notes.

Arthur Bragdt states that he followed Sandow's notes in retracing the lines. He failed to follow the notes so far as witness trees are concerned for those notes clearly show that the closing corner was witnessed by two trees. He, as a surveyor, should know from this that the corner was not at or in the Lake. Evidently he ran out the lines by courses and distances making no attempt to retrace the steps of the orig-

inal surveyor as indicated by the notes and official plat, and arbitrarily adopted the proportional method.

The proportional method in re-establishing missing corners is used where there is no evidence from which the position of the original line or corner can be determined.

> "The rule as to restoring lost corners by putting them at an equal distance between two known corners has no application if the line can be retraced as established in the field. The field notes should be taken and from the corners and distances, natural monuments or objects and bearing trees described therein the surveyor should endeavor to fix the line precisely as it is called for by the field notes. He should endeavor to retrace the steps of the man who made the original survey. If by so doing the line can be located it must be done and when so located it must control."
>
> *County of Yolo vs Nolan,* 144 Cal. 445, 448.
>
> "The proportional method need not be used where the evidence on the ground fixes the position of a corner, regardless of inaccuracy of measurements and errors in distance found in he field notes."
>
> *Weaver vs. Howatt,* 161 Cal. 77, 84; 171 Cal. 302,
> *McKenzie vs Nichelini,* 43 Cal. App. 194,
> *Wilman vs Aros,* 191 Cal. 80.

In this case the plat and field notes agree in placing the closing corner east of Silver Lake. The lands now held by the defendant, Marble Burch, were patented in accordance with the original plat and field notes on file in the Land Office.

> "When lands are granted according to an official plat of their survey, the plat, with its notes,

lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and, so far as limits are concerned, controls as much as if such descriptive features were written out on the face of the deed or grant."

Cragin vs Powell, 128 U. S. 691,
U. S. vs State Inv. Co., 285 Fed. 128.

"Reference in patent to plat and field notes incorporates them in such patent."

Foss vs Johnstone, 158 Cal. 119,
Chapman vs Polack, 70 Cal. 487.

The patent in this case provides:

"According to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General."

"It is usually held that these words will constitute a part of the description of the premises conveyed, and limit the purchaser to the tract as marked upon the plat of the Surveyor General."

Boundaries, 4 R. C. L. Sec. 55.

The defendant contends that the field notes do not agree with the plat and that therefore the field notes should prevail. The weight of authority, however, is to the effect that the plat prevails.

"According to the weight of authority if there is any inconsistency between the plat and the field notes, the plat must control. There are, however, some decisions which have adopted the contrary rule."

Boundaries, 9 C J Sec. 143.

A typical case is that of *Haley vs Martin,* 85 Miss 698, 38 S 99, where it was held:

"The grantee of certain lots in a deed describing them by reference to a recorded plat of a survey takes his boundaries under the plat irrespective of the field notes." (Syllabus).

The Court remarked in the course of the opinion:

"It is questionable if any man buying by a recorded map would bother about the field notes."

The rule in California is an exception to the weight of authority.

"In the absence of evidence to the contrary, the map is presumed to correctly represent the survey and the latter need not be looked to but if it be shown that a discrepancy exists between the map and the survey, the latter must prevail."

Whitney vs. Gardner, 80 Cal. 78.

"The case of *Chapman vs Polack,* 70 Cal. 487, is relied upon but it does not support the appellant's position. There the government survey and the map founded upon it agreed and it was attempted to show by private survey that both were wrong. It was very properly held that this could not be done and that the map was conclusive."

Whitney vs Gardner, 80 Cal. 78, 80,
Harrington vs Boehmer, 134 Cal. 196.

The appellant has not pointed out definitely in what respects the plat and field notes disagree. Arthur Bragdt testifies:

"the course of this gravelled trail is directly south 87° 47′, it has varied by 2° 3′ on the west line, and that is his corrected notes as delineated on his map but not in his field notes. When I refer to the map I refer to Exhibit 1 accompanying his field notes, and I had a copy of them; I said that Sandow delineates that corner on his map but does not give it correctly

> in his field notes (Record p. 33). I do not mean to say the map is incorrect; I followed the plat in determining the courses; there is no evidence of any correction as to distances." (Record p. 34)

We gather from this that the map is correct and the field notes wrong, although later Bragdt changed his mind and said he did not accept the map as correct and that it is wrong by the field notes. What we think he really means is that he found the distances to Silver Lake on the ground did not check with those shown on the plat and in the field notes. But corners and distances are controlled by natural monuments as pointed out in appellant's brief (p. 20). We agree with the rules in the cases there quoted and cited relating to the control of natural monuments.

In the present case the east line of Silver Lake is placed by Sandow 22.65 chains on the Standard Parallel from the southeast corner of Section 35. Appellant misses the point. If Sandow intersected the Lake line in going west on the south boundary of Section 35 he would also mention such intersection *if he intersected the Lake line in going north on the line between Sections* 1 *and* 2 *provided the closing corner fell in the Lake.* But Sandow did not mention this Lake on that line definitely showing that he did not go through the water to his corner.

The original record places this closing corner 1.50 chs. Westerly of the Lake shore, with a SE. and SW. bearing tree. No mention of the Lake shore line is made in the record of the line between Sections 1 and 2 closing from the south. It is therefore

absolutely certain that a re-establishment by proportion will not place the corner at even a close approximation of its original position.

As stated previously the Government contends that there is no discrepancy between the plat and field notes so far as the relative location of the closing corner and Silver Lake is concerned. Both show that the closing corner was set by Sandow east of Silver Lake; that the Lake is entirely within Section 2; and that at no place does it touch Section 1.

The defendant is in this case endeavoring by a private survey to put a different interpretation upon the field notes than that adopted by the Government when the official plat was made and filed. This cannot be done.

> "The evidence of a private survey in contradiction of the plats of the surveys of the United States is not admissible."
>
> *Chapman vs. Polack,* 70 Cal. 487, 496.

It will also be noted that neither the plat or Sandow's field notes mention a witness corner. Under the manual of instructions surveyors are required to note the precise relative position of witness corners to true corners and to set witness corners where the position of true corners fall in lakes or swamps. To illustrate the instructions say:

> "Where the true point for a corner falls upon insecure ground, or in an inaccessible place, such as within an unmeandered stream, lake or pond, or in a marsh, or upon a precipitous slope or cliff, a witness corner will be established at some suitable point, preferably on a surveyed line,

where the monument may be permanently constructed."

Manual of Instructions for the Survey of the Public Lands of the United States. Paragraph 250, page 230.

This is further evidence that the closing corner never was set by Sandow in the Lake but at the point shown on the official map.

Appellant quotes from a case (Brief p.20) concerning conflict between map and field notes as to quantity of land in a patent. There is no evidence here that appellant did not receive the amount of land called for and indicated on the plat.

Appellant cites authority (Brief p. 24 and 25) concerning meander corners. Silver Lake is not meandered and there is no question here regarding meander corner.

Appellant argues (Brief p. 28, 29, 30) concerning the position, size and shape of Silver Lake by calculation from the random line run by Sandow and the distance he notes. But the notes show that these distances were on the true line and not on the random line. Appellant also overlooks the fact that Sandow did not encounter the Lake in coming north to the closing corner. As to the size and shape of Silver Lake we believe this to be immaterial, the point being that appellant's northwest corner was not placed in the Lake as claimed by his surveyor. Furthermore appellant has not introduced any evidence that the position, size or shape of Silver Lake has changed since Sandow's survey. The evidence

before the court on that point is that of the official plat.

Appellant states (Brief p. 30) that Sandow in running north to the closing corner "did not make a single reference as to any symbols, natural monuments, blazed trees, or any call for distance to any intermediate points or point from which the locus of Point 4 might be determined."

Regarding natural monuments it is signficant that Sandow mentioned none. This for the reason that he encountered none. But if he placed the corner as claimed by appellant in Silver Lake, Sandow would have had to go through the water of Silver Lake 300 feet and would have placed a witness corner in accordance with his instructions.

As to blazed trees on or adjacent to the line, these are not ordinarily mentioned in the field notes. Sandow however did blaze the witness trees to this corner and located them with reference to it, absolutely proving that he did not place the corner in the Lake.

Appellant cites the case of *Herrington vs Boehmer,* 134 Cal. 196 (Brief p. 31). In this case the original plat was amended by the U. S. Land Department a year and some months after its approval, to make it correspond to the field notes. The original plat was erroneous in that it showed a tract of land which did not exist as described in the patent. The court says (p. 199):

> "The question in all cases similar to this is, Where were the lines run in the field by the government surveyor?"

It is sufficient to say that no such state of facts exists here as in the Boehmer case (supra). The only question involved here is the location of the obliterated corner.

Appellant contends (Brief p. 31) that his boundaries must conform strictly to the field notes and he is then entitled to that portion of Silver Lake intersected by his west boundary. Both the field notes and plat show that his west boundary never intersected the Lake.

Appellant cites the case of *Staiden vs. Helin,* 79 NW 537, (Brief p. 32) concerning the testimony of eye witnesses as to the location of a corner, and mentions Arthur Bragdt in this connection. This witness did not testify that he saw this corner. The only testimony in any way resembling eye witness testimony is that of the appellant with respect to what Cooper told him. Cooper told him to look for the corner about 90 paces from the lake at or on an old road. Appellant did not observe these instructions probably because it would not conform to his surveyor's proportionate measurement placing the corner in the Lake.

To recapitulate: There are 10 reasons appearing in the evidence why the closing corner cannot be arbitrarily placed in Silver Lake by proportionate measurement.

1. The official plat shows the closing corner not in or at the Lake.

2. Sandow set no witness corner in his original survey.

3. Sandow marked witness trees to identify the location of the corner.

4. Trees do not grow in water.

5. One witness tree is placed by Sandow between the corner and Silver Lake.

6. Sandow did not intersect the shore line of Silver Lake going north to the closing corner on the line between Sections 1 and 2.

7. There is no evidence introduced by appellant that there has been any change in the shore line or size or shape of Silver Lake since Sandow made his survey in 1882. The official plat discloses the correct evidence on this point.

8. Sandow's notes place the closing corner 1.5 chains from Silver Lake.

9. The appellant did not follow the instructions of Cooper his predecessor in title in locating this corner about 90 paces or steps from the Lake on or at an old road.

10. Appellant fails to state that Cooper told him the corner was in the Lake.

From the testimony of Burch and Bragdt it is clearly apparent that they ignored the 10 reasons above stated and now shown by the evidence. They arbitrarily located the closing corner in Silver Lake.

CONCLUSION

In view of the foregoing considerations it is submitted that the insufficiency of evidence claimed by appellant was admitted by his answer and at any rate fully covered by defendant's case in chief; that the actual disputed line and corner was located exactly as contended for by the Government. The Court below is correct in its conclusions and should be sustained.

Respectfully submitted,

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